DONALD V. SMILEY and RONALD L. WATTS

Intrastate Federalism in Canada

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Donald V. Smiley
and
Ronald L. Watts

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When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's research program was carried out under the joint direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September, 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as Co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD

At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (more than 280 separate studies in 72 volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas, — *Law and Constitutional Issues*, under Ivan Bernier; *Politics and Institutions of Government*, under Alan Cairns; and *Economics*, under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*
- The Canadian Economic Union — *Mark Krasnick*

- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

Economics research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, the ways in which institutions and policies affect this

allocation, and the distribution of the gains from their use. It also considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald; the Commission's Executive Director, J. Gerald Godsoe; and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well deserved thank you to our closest assistants: Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

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IVAN BERNIER
ALAN CAIRNS
DAVID C. SMITH

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Among its terms of reference the Commission was required to consider "changes in the institutions of national government so as to take better account of the views and needs of all Canadians and regions." The section of the Politics and Political Institutions Research Area that was entitled "Representative Institutions" had its research program shaped primarily by this particular focus.

Nine studies were undertaken within the research program of Representative Institutions. Of these, one was meant to provide a comprehensive overview of the relationships beween our institutions of national government and the federal structure of our Canadian political system. In this way the other studies of the institutions of national government could be related to studies done in other sections of the Politics and Political Institutions Research Area and especially to those focussed explicitly on our federal system of government.

Professors Donald Smiley and Ronald Watts were commissioned to undertake this overview. Their work provides a comparative account of the approaches of several other federal systems to the questions at hand and assesses the numerous proposals made in Canada for the reform of our system. This study also includes a consideration of Canadian legislative, executive and judicial institutions.

PETER AUCOIN

During the past decade of constitutional debate in Canada, the issue of the reform of federal institutions has drawn much attention because of concerns about the apparent ineffectiveness of these institutions — particularly the cabinet, the House of Commons, the Senate and the Supreme Court — to accommodate and reconcile the variety of regional interests. This study examines the reform of federal institutions in Canada in terms of a focus upon intrastate federalism, that is, the extent to which the institutions and processes of the central government are responsive to the interests and concerns of the country's regions. In Canada, as in other federations, regional interests are safeguarded not only by a constitutional distribution of powers between central and provincial authorities (interstate federalism), but also by devices and processes through which these interests are channelled into the operations of central government (intrastate federalism). The constitutional distinction between interstate federalism and intrastate federalism in one respect presents alternative strategies or emphases, but in another respect provides complementary structures and processes for ensuring the position of regional minorities within a federal political system.

The issues addressed in this study have a particular relevance to the mandate of the Royal Commission on the Economic Union and Development Prospects for Canada because of the impact which the character of central institutions within a federal system inevitably has upon the capacity of the federal government to mobilize resources and develop economic, social and foreign policies with a wide degree of support within the federation.

After defining the intrastate dimension of federalism, Chapter 1 attempts to locate intrastate analysis within the context of recent consti-

tutional debate in Canada. Prior to the late 1970s, the intrastate emphasis was muted. The major focus was on a new accommodation between the French-speaking and English-speaking communities. Quebec nationalists of various persuasions were preoccupied with safeguarding and expanding the political powers of Quebec, while their most influential opponents espoused a solution which would enhance the rights of individual citizens of French-speaking or English-speaking affiliations wherever in Canada they might live. Intrastate thinking had its major impetus in the accumulated grievances of western Canada in the post-1976 period and in the increasing disposition of thoughtful persons to believe that constitutional changes were necessary to come to terms with the exigencies of cultural duality and regional alienation.

Chapters 2 and 3 are devoted to a critical analysis of the assumptions of intrastate reform. These assumptions are:

- the institutions of the central government now operate in an unduly centralized and majoritarian way;
- the power and legitimacy of the central government are compromised because this method of organization does not provide an effective outlet for territorially based interests;
- because central institutions do not adequately reflect provincial and regional interests, the powers of the provincial governments have increased and can be contained only by making the government of Canada more representative of and responsive to such interests;
- the present structures lead to an unacceptably high level of conflict between the federal and provincial governments; and
- it is necessary and desirable that individual Canadians be represented in the institutions of the central government by virtue of their membership in provincial communities as well as their residence in federal constituencies for the election of members to the House of Commons.

Chapter 4 locates the current Canadian debate about intrastate federalism within the context of the experience of other federations.

The remaining chapters of the study, Chapters 5 to 8, are devoted to a critical analysis of intrastate recommendations for reform of the institutions of the central government in Canada — the cabinet and the federal bureaucracy, the House of Commons, a reformed second chamber and the Supreme Court of Canada.

Three points should be made at the outset about our study. First, the study was completed in September 1984. Consequently, most of the literature to which it refers and our own analysis relate to the period prior to the federal election which occurred in that month. The decade prior to that was a period marked by rising anxiety within Canada over the apparent inability of any of our national political parties, and hence the federal government, to draw a wide-based support from all the major regions within the country, and by the perceived consequent need for

revised institutional arrangements to counteract this shortcoming. Just as the study was being completed, the federal election produced a sweeping majority for the Progressive Conservatives, thus appearing to resolve the concerns of the previous decade.

It is obviously too early to draw out any long-term implications of this apparent watershed in Canadian politics. Much of what was taken in the decade before 1984 to be deep-rooted regional protest may have been in essence animosity to the Trudeau Liberal regime rather than to the federal institutions. The Progressive Conservative sweeping victory under Brian Mulroney may purge much of the feeling of popular alienation in the West and moderate the force of separatism in Quebec. Nevertheless, it would be dangerous for Canadians to assume that the problems of reconciling different regional interests within our federal institutions will disappear or that similar electoral results to those which occurred during the preceding decade and a half could not recur. The volatility of the electorate and the rapid erosion of the trans-regional majority gained by the Progressive Conservatives in 1958 under John Diefenbaker should provide warning enough. Furthermore, both the major opposition parties, the Liberals and the NDP, continue to be regionally localized in their electoral support after the 1984 election, indicating the need for them to become more broadly national in their support base. The election of 1984 may have temporarily removed the apparent immediate urgency for reform of our federal institutions in a direction that would encourage a more adequate expression of intrastate federalism. But the need for our federal institutions to accommodate and reconcile Canada's regional diversity remains, and it deserves careful examination.

Secondly, since this is one in a series of studies sponsored by the Royal Commission, we have been fortunate in being able to draw on the earlier drafts of a number of other related studies prepared for the Commission. At the same time, conscious that the Commission is publishing a number of the specific studies on the political parties, on the public service and on the Supreme Court, we have deliberately dealt more briefly with these aspects in our own study than we might otherwise have done.

Thirdly, although the policy conclusions we offer dealing with reform of the executive, the House of Commons, the second chamber, and the Supreme Court of Canada are largely based on the theme of intrastate federalism, we have not confined ourselves solely to issues relating to intrastate federalism. Our policy conclusions are also directed to the broader general context of the reform of federal institutions in Canada.

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DONALD SMILEY
AND
RONALD WATTS

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The Intrastate Dimension of Federalism

Students commencing the study of political science are usually instructed that there are three alternative ways of organizing governmental power in a state which is sovereign in the sense that its processes of decision making are not subject to any external legal authority. These modes are unitary, federal and confederal. The last of these is uncommon in the modern world, and the student will probably learn no more than that the United States adopted this form in 1781, found it unsatisfactory, and moved to federalism under the Constitution of 1787.[1] The alternatives generally focussed upon are therefore the unitary and federal, and the United Kingdom and the United States are the respective prototypes.

A.V. Dicey in his classic *Introduction to the Study of the Law of the Constitution*, whose first edition was published in 1885, describes the "three leading characteristics of completely developed federalism" as

the supremacy of the constitution — the distribution among bodies with limited and co-ordinate authority of the different powers of government — the authority of the Courts to act as interpreters of the constitution.[2]

Dicey derives this juristic definition of federalism from the American experience. In somewhat similar fashion, K.C. Wheare more recently enunciates "the federal principle" as

the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent.[3]

The Dicey-Wheare definition of federalism has rightly been faulted by contemporary scholars for giving undue emphasis to the mutual independence of the central and regional authorities within the spheres of

jurisdiction allocated to them by the constitution. It has been additionally criticized for neglecting the interdependence of these governments and the complex pattern of intergovernmental relations that are so prominent in all existing federations. Although the United States is often regarded as the prototype of federations, the research of Daniel Elazar and the late Morton Grodzins has shown that, from the very early days of the Republic onward, there developed an intricate pattern of cooperative interactions between the national and state governments.[4] Apart from the research of Christopher Armstrong and H.V. Nelles on federal-Ontario relations,[5] there has been little systematic investigation of the relations between Ottawa and the provinces prior to the 1930s,[6] although it is perhaps possible that such investigation may turn up evidence similar to that of Elazar and Grodzins. At any rate, students of contemporary federations are very much aware of the intricate pattern of relations between governments as they attempt to cope with the circumstances of their mutual interdependence. At times, this preoccupation with intergovernmental relations, with what Canadians have come to call "executive federalism," has come almost completely to displace the former emphasis on the juristic elements of federal systems. One recent book, for example, on United States government, entitled *Pragmatic Federalism*, is organized around six pairs of intergovernmental relations.[7]

Yet even an approach which goes beyond the Dicey-Wheare formulation to take into account the interactions among governments in contemporary federations makes us oblivious to a very crucial dimension of the federal experience. This dimension is the way in which regional interests and values are provided for in the structures and operations of the central governments of federations. In a recent book, Preston King emphasizes this element and writes:

> We propose that any federation be regarded as an institutional arrangement, taking the form of a sovereign state, and distinguished from other such states solely by the fact that its central government incorporates regional units into its decision procedure on some constitutionally entrenched basis.[8]

King's definition of the distinctive character of federations as the constitutional entrenchment of regional power at the centre is a valuable corrective to formulations which exclusively or almost exclusively focus on the division of powers between the national and the state/provincial/cantonal governments and the relations between these governments. Significantly, in the founding of the American, Canadian and Australian federations, it was not the constitutional distribution of powers which proved to be the most intractable issue but rather conflicts between larger and smaller constituent units about the composition and powers of

the second chamber of the national legislature. The "Connecticut Compromise" as reported to the Philadelphia convention on July 5, 1787, is generally believed to have saved that convention from failure. This compromise, involving a bicameral solution, reconciled the conflicting demands for representation according to population and for equality of state representation in Congress. This provided that states would be allowed one member in the lower house for each 40,000 inhabitants, that all bills for the revising or appropriating of public money would originate in the lower house and not be subject to amendment by the upper chamber, and that each state would have an equal number of representatives in the upper house whose members could be elected by the legislatures of the states. At the Quebec Conference of 1864, the British North American politicians gave over six of the fourteen days devoted to the discussion of the Confederation scheme to consideration of the composition of the second chamber with *their* version of the Connecticut Conference — namely, equal representation of Ontario, Quebec and the Maritime provinces in the Senate. In the events leading up to the foundation of the Commonwealth of Australia, it was early decided that the upper house should be directly elected by residents of the states and that each state should have the same number of members; but the most intractable issue that emerged was one relating to the powers of the Senate to amend financial legislation.[9] R.L.Watts writes more generally:

> Because control of the central legislature is a major element in the control of central power, the organization of the central legislature has proved a contentious issue during the creation of every federation.[10]

Other institutional elements besides the second chamber of the national legislature have served to protect the interests of regions in the operations of the central governments of federations. In an article published in 1955, Herbert Wechsler analyzed "the political safeguards of federalism" in terms of the roles of the American states in the procedures by which members of the national government were chosen. Subject to certain constitutional provisions, the state legislatures controlled the qualifications of voters in national elections and also, within certain judicially determined guidelines, the delineation of the boundaries of congressional districts.[11] Presidential electors were appointed by the states in the manner determined by their respective legislatures, and these legislatures also controlled the procedures for nominating party candidates for national office.[12] Wechsler argued that these political safeguards have been more important in protecting the states against intrusive national action than the activities of the Supreme Court in invalidating manifestations of Washington's power. In the Canadian case, the decisions made by the British North American politicians at

the Westminster Conference of 1866 about the size and composition of the Dominion cabinet were an essential element of the Confederation settlement.

According to those decisions, there was to be a single prime minister rather than, as in the United Provinces of Canada, two political heads of government. In the first cabinet, Ontario was to have five members including the prime minister, Quebec four, and Nova Scotia and New Brunswick two each. Regional representation in the federal cabinet was from the first and continues to be an important device for sensitizing the government of Canada to regional interests, values and grievances.

A federal political system involves the protection of regional units in the structures and operations of the governmental systems within a sovereign state. Such protection may be either of the governmental authorities of the provinces/states/cantons or of the people who reside within the territorial boundaries of those sub-national jurisdictions. There are two sets of choices.

First, there is the distribution of authority between the general and regional governments whereby jurisdiction, with respect to those matters about which the regional units differ most markedly or which they insist are essential to preserving their distinctiveness, is conferred by the constitution on the states or provinces. In this study, we designate the distribution of powers and financial resources between the federal and provincial governments as well as the relations between those two orders of government as "interstate federalism."

Secondly, there are arrangements by which the interests of regional units — the interests either of the government or of the residents of these units — are channelled through and protected by the structures and operations of the central government. We call this "intrastate federalism."

The founding and subsequent experience of federations is characterized by a complex relation between interstate and intrastate elements.[13] Thus we view interstate and intrastate strategies as partly complementary and partly contradictory and, because of this aspect of complementarity, we reject both the interstate definitions of Dicey and Wheare and the intrastate definition of King as being the exclusive differentiating characteristics of federal political systems.

The Context of the Current Debate on the Canadian Constitution

This chapter traces the rise of the intrastate dimension of federalism in Canadian constitutional debate. Throughout our study, we attempt to relate what people have said and written about the governmental system to an analysis of this system itself on the assumption that political debate is an essential element of the political process.

The Passing of Constitutional Conservatism, 1960–76

The past 25 years have witnessed an enormous amount of debate among Canadians about constitutional reform. This is something new in the country's history. Although a stream of criticism about the Senate emerged shortly after Confederation, with continual proposals for its reform,[1] the period prior to the 1960s was characterized by a prevailing constitutional conservatism. Few Canadians at this time seemed to believe constitutional reform was necessary for the defence and furtherance of the values and interests they espoused. Prior to the 1960s, only two major sets of proposals, one in 1887 and another in 1935, were presented for explicit and comprehensive constitutional change.

The Interprovincial Conference of 1887 convened by the newly elected premier of Quebec and attended by representatives of all the provinces except British Columbia challenged many of the centralizing features of the conservatism of Prime Minister John A. Macdonald in passing resolutions dealing with the financial and other grievances of the provinces. The conference recommended that senators be chosen by the provinces and that the power of disallowance be abolished.[2] The Macdonald government ignored these resolutions, the legislative councils of three of the provinces failed to ratify them, the federal Liberals did not

press the provincialist cause in Parliament, and the conference lapsed into historical obscurity.

The 1935 report of the League for Social Reconstruction recommended the abolition of the Senate, constitutional amendments that would extend federal jurisdiction with respect to social legislation and economic planning, a procedure to permit amendment of the constitution by Parliament alone, and an entrenched bill of rights.[3] However, these radical constitutional proposals were in a sense tacked on at the end of the report, and their rationale was elaborated in only a very fragmentary way. Moreover, the authors showed less than complete conviction about the urgency of constitutional reform by writing, "There are great opportunities in the existing constitution, without any amendment, for Dominion control over economic matters of national importance,"[4] and that, unlike the Constitution of the United States, "The BNA Act is a mere political framework, not inextricably tied up with a particular economic system."[5]

Thus for more than a century, with the exception of the few occasions cited, intrastate concerns lay largely dormant in Canadian constitutional thinking. To some extent, this can be attributed to the fact that, until the St. Laurent era, cabinets contained an apparently adequate intrastate element in their operation. However, the changing character of the cabinet, particularly during the 1970s, combined with the enhanced role of the state in the more recent period, have changed the context.

Prior to the 1960s, Canadians for the most part did not view the constitution as such as an obstacle to interests or values that particular groups wished to advance or defend. Although there was little worship of the constitution and few if any regarded the British North America Act as a primary symbol of national unity, successive generations of Canadians were taught to show a decent respect for the country's constitutional arrangements. The participants in constitutional discussion who espoused one version or other of the compact theory of Confederation were defending the continuing legitimacy of the compact as they themselves understood it. Yet even those who rejected this position, particularly in the vigorous constitutional conflicts of the 1930s, argued that it was not the constitution itself but the way in which this document had been interpreted by the Judicial Committee of the Privy Council that was responsible for the country's constitutional problems. The most exhaustively documented argument along these lines, the O'Connor Report[6] commissioned by the Senate and published in 1940, recommended a constitutional amendment that would in effect require the BNA Act to be judicially interpreted according to accepted canons of Anglo-Canadian statutory interpretation, from which the Judicial Committee had allegedly strayed since 1896 onward.

The constitutional conservatism prevailing in Canada since Confederation was decisively challenged by a widespread and vigorous

constitutional debate that emanated from the modern and modernizing Quebec of the 1960s.[7] As recently as 1956, the Tremblay Report[8] commissioned by the government of Quebec presented the most elegant and exhaustive defence ever made of the theory of Confederation as a French-English compact. This quasi-official statement of the constitutional consensus among the francophone elites of the province took the traditional view that it was not the constitution itself but the failure of the central government and of English-speaking Canadians more generally to adhere to its letter and spirit as the source of Quebec's grievances. This view, as well as its philosophical and theological underpinnings articulated in Roman Catholic thought, seemed almost archaic in the Quebec of a decade later.

Within the new Quebec, the focus of the constitutional debate which began in the early 1960s was on strengthening the powers of the provincial government as the chief instrument of the flowering of a revitalized national community.[9] There were various solutions proposed to this general end. At one end of the spectrum, there were persons with some confidence that without explicit changes in the constitution the financial, legislative and administrative autonomy of the Quebec authorities might be strengthened. At the other extreme were views that the integrity of the Québécois nation required Quebec to be a sovereign state, whether in economic association with Canada or otherwise. Between these poles, there were various solutions such as those which would give Quebec a wider range of powers than the other provinces had or which visualized Quebec and Canada as being jointly governed under some kind of "associate states" arrangement.

The coming to power of the Union Nationale government under Daniel Johnson as a result of the Quebec provincial election of June 1966 precipitated a response from the other governments in Canada to the demands for constitutional reform emanating from Quebec. During its six years in office, the Jean Lesage Liberal government had failed to evolve a unified and coherent stance with respect to constitutional matters.[10] Some in the government espoused even the most nationalistic variants of change while others were disposed to be relatively satisfied with the success that Quebec had gained in strengthening its own powers and restricting those of Ottawa under the existing constitutional system. The opposition Union Nationale on the other hand by the mid-1960s had decisively dissociated itself from traditional Quebec conservatism in constitutional matters. In 1965, it challenged the Liberals to fight the next provincial election on the government's acceptance of the Fulton-Favreau formula for a domestic constitutional amending procedure and the government's alleged opportunism in constitutional matters. That same year Johnson published a short book entitled *Égalité ou Indépendance*, which called for early and radical reform of the constitution on bi-national lines.[11]

The first positive response by other governments in Canada to the demands for constitutional change emanating from Quebec was the convening by the premier of Ontario of the interprovincial Confederation of Tomorrow Conference in November 1967. The coming to power of the Union Nationale had coincided with a much less permissive stance by the federal government toward provincial pressure for enhanced fiscal and administrative autonomy. This harder line was in large part a result of the growing influence on the government of the "new guard" Liberals from Quebec (most importantly Jean Marchand, Gérard Pelletier and Pierre Elliott Trudeau) who were resolute opponents of Quebec nationalism. Furthermore, the election of the Union Nationale had brought about the rupture of personal relationships between leaders in the governments in Ottawa and Quebec City. The Ontario initiative was in part a statesmanlike reaction by Premier John Robarts, who was attempting to sensitize his fellow premiers to the new Quebec, and in part a pragmatic reaction to the polarization between the federal and Quebec governments. This rupture, if it continued, might have presented Ontario with the unpalatable alternatives of choosing between the two or foregoing any positive influence on the outcome of their struggle.

The federal government deeply resented what it regarded as the usurpation of national leadership by Ontario in convening the 1967 Conference, and had little taste for explicit constitutional reform. However, once the process of constitutional debate and review among governments had been initiated, Ottawa could not dissociate itself from it. The first Federal-Provincial Conference on the Constitution met in February 1968. At the opening of the conference, Prime Minister Lester Pearson introduced a federal policy document, *Federalism for the Future*, which in a somewhat general way outlined Ottawa's priorities and strategies in respect to constitutional reform.[12]

According to *Federalism for the Future*, constitutional review and reform should be comprehensive rather than piecemeal, and should proceed in three successive stages.[13] The first priority in constitutional reform was the entrenchment of individual rights, the last the distribution of legislative powers between Ottawa and the provinces. During the first period of constitutional review between the first Constitutional Conference of February 1968 and the conference which contrived the Victoria Charter of June 1971, the federal authorities showed some willingness to consider seriously a distribution of powers more favourable to the provinces — specifically, to give the provinces access to some kinds of indirect taxation along with a constitutional limitation on the federal spending powers — as part of a comprehensive constitutional settlement. Moreover, the Victoria Charter contained certain restrictions on existing federal powers relating to income assistance.

This was in sharp contrast to the outcome of the constitutional review period beginning shortly after the Quebec referendum on sovereignty/association in May of 1980 and culminating in the constitutional accord between Ottawa and the governments of all the provinces except Quebec in November of the following year. During this time, the Trudeau government was much less willing to consider any extension of provincial powers and in particular showed some urgency that these powers should be restricted in order to preserve the Canadian common market.[14] Despite these changes in its stance toward the federal-provincial distribution of powers, successive Liberal governments from 1968 onward never diverged from the policy that the entrenchment of individual rights was the highest and most urgent priority of constitutional reform.

The process of constitutional review by governments and the wider constitutional debate in Canada between the 1968 conference and coming to power of the Parti Québécois government in Quebec in November 1976 was focussed almost exclusively on French-English relations. So far as successive governments of Quebec were concerned, there was a single-minded emphasis on the preserving and extending the powers of the province as the chief instrument of the unity and integrity of the Québécois nation.

The federal response, most coherently and persistently articulated by Pierre Elliott Trudeau, saw the imperatives for reform in quite different directions. He insisted that the francophone community of Canada was not to be equated with Quebec alone and, on this basis, that the government of Quebec did not have the exclusive right to speak for French Canadians. He wanted Canada to become, in a fuller sense than before, a French-English community throughout; to this end, wherever concentrations of population of official-language groups made this at all practical, English-speaking and French-speaking Canadians needed to have rights and resources to sustain their respective languages and to deal with the public authorities in those languages. The federal view found it essential that francophones should become more powerful than before in the federal government, both in the cabinet and at the senior levels of the public service. In general, if the rights of francophones could be effectively enhanced through the extended entrenchment of their linguistic rights and if the institutions of the central government could be made more representative of and responsive to their interests, the federal group saw no urgent need for strengthening provincial powers.

To repeat, the Canadian constitutional debate prior to the mid-1970s had been triggered by the new circumstances of French-English relations. Most English-speaking Canadians, especially the political leaders of the provinces other than Quebec, were not deeply dissatisfied with the existing constitutional arrangements. On this basis, they could be persuaded to support constitutional changes only if it was believed that such

reforms were perceived to be necessary for more harmonious relations between Canada's two historic communities or even for the survival of Confederation. In intergovernmental discussions on constitutional change, the provinces other than Quebec gave first priority at interprovincial meetings to issues which did not lend themselves to constitutional resolution, such as fiscal equalization or the narrowing of regional economic disparities.

Despite the lingering elements of constitutional conservatism, the pressures emanating from Quebec from the early 1960s onward have caused all Canadians interested in public affairs to question more critically than before the constitutional system under which they live. Increasingly, people are coming to believe that their interests and values can be safeguarded through constitutional change.

A dramatic example of this has occurred with respect to women and groups representing their interests. The report of the federal Royal Commission on the Status of Women,[15] published in 1970, made 167 specific recommendations. Yet in none of these recommendations nor in the four separate statements and minority reports issued by individual members of the commission was there any suggestion that the enhanced status of women required constitutional change, either in the federal-provincial distribution of powers or in the entrenchment of women's rights. This is, of course, in marked contrast to the vigour with which women's groups pressed for constitutional change in the events leading up to the proclamation of the Canadian Charter of Rights and Freedoms in 1982.[16]

In the sets of events initiated by the governmental authorities, the wider Canadian public has been involved in the Canadian constitutional debate. The Special Joint Committee of the Senate and House of Commons on the Constitution held meetings in 47 towns and cities during 1970–72, the Task Force on Canadian Unity (The Pepin-Robarts Committee) held 15 public hearings throughout Canada in 1977–78, and the Special Joint Committee of the Senate and House of Commons on the Constitution held lengthy and televised hearings in Ottawa during 1980–81. Thus constitutional debate became more widespread than at any previous period in Canadian history, with the corollary that Canadians came increasingly to believe that whatever ailed the body politic was susceptible to cure through constitutional change.

The constitutional review and discussion until the mid-1970s was characterized by a relative neglect of what we designated in the introduction as the intrastate dimension of federalism. As noted above, *Federalism for the Future* did specify reform of central government institutions as one of the steps in the projected constitutional review. However, in the events that led up to the Victoria Charter of 1971, there appears to have been little emphasis on intrastate matters. A Committee of Ministers on the Senate was established and met once in 1969, but apparently

made no report.[17] Nor did the first ministers' conference at which the Victoria Charter was discussed raise the issue of reform of the second chamber. Apparently, the only allusions to intrastate federalism were made at two meetings in 1969 of a Committee of Ministers on the Judiciary, and in the provisions contained in the Victoria Charter for the constitutional specification of the jurisdiction and composition of the Supreme Court of Canada and for the participation of the provincial governments in the nomination of its members.

In this period, there were also two other instances of intrastate proposals. One was the speech of Quebec Premier Lesage to the Federal-Provincial Conference of November 1963, in which he proposed that the provincial governments be given the opportunity to participate in the formation of national economic policies.[18] This participation was projected to take place through permanent federal-provincial institutions responsible for "tariff structures, transportation and even the monetary policies of Canada," which had up to then been considered to be under exclusive federal jurisdiction. However, neither the Lesage government nor succeeding Quebec administrations followed up on this kind of intrastate proposal.

The other instance appeared in the recommendations of the Special Joint Committee of the Senate and House of Commons on the Constitution in its 1972 Report, several of which related to the central government.[19] They advised that the Senate powers should be restricted to a suspensive veto over bills passed by the House of Commons, and that the senators for each province or territory "should be appointed by the Federal Government from a panel of nominees submitted by the appropriate Provincial or Territorial Government." Also they proposed that the provinces should participate in the choice of members of the Supreme Court of Canada. Yet again, these intrastate proposals did not at the time lead to much public discussion.

So long as the major impetus of constitutional debate and reform lay in French-English relations, intrastate proposals for constitutional revision were generally muted. In place of discussions, there was a kind of de facto intrastate reform in linguistic influence. This was seen in the rapid increase in numbers of francophones rising to positions of authority in Ottawa and in the recognition of the French language in the operations of the national government administration. Overt signs included the Official Languages Act of 1969, policies of the federal public service promoting bilingualism, "French power" in the cabinet and the higher reaches of the federal bureaucracy, a Québécois prime minister and the strength of Québécois in the federal Liberal caucus, and so on. On this basis, there could be little case made that the francophone community of Quebec was inadequately represented in the operations of the central government.

After November 1976: The Rise of Intrastate Federalism

The period between the election of the government of René Lévesque in November 1976 and the Quebec referendum on sovereignty/association in May 1980 was featured by a veritable explosion of constitutional debate among English-speaking Canadians. Significantly, this debate did not result in a consensus of even the broadest kind about the terms on which the federalist forces might fight the referendum. Instead the almost exclusive focus on French-English relations was displaced by perspectives which located the constitutional difficulties of the Canadian community in a context broader than that of accommodation between the two historic language groups. The interstate perspectives which had dominated the debate in the previous decade and a half gave way to a new focus on intrastate reforms which may well continue to be prominent in any Canadian constitutional discussions in the decade ahead.

The new emphasis in constitutional debate on proposals for reforming the institutions of the central government can in large part be attributed to the growing assertiveness of the western provinces and their desire to make their political power in national affairs commensurate with their economic power. As Roger Gibbins points out, constitutional reform has only recently become a major concern of western Canadians.[20] He writes:

> This is not to suggest that western Canadians have been satisfied with the political status quo; the multitude of protest movements that rocked the national and provincial party systems provide ample evidence to the contrary. Western discontent, however, never crystallized into an alternative constitutional vision. Protest was directed more against party discipline, the electoral weight of the East, and the control of national parties by eastern financial interests than against the constitutional underpinnings of the Canadian federal state. Only rarely was it recognized that problems such as rigid party discipline were essential features, rather than corruptions, of parliamentary institutions.[21]

Gibbins goes on to point out that, apart from the struggle with Ottawa which resulted in the 1931 transfer of ownership over natural resources to the Prairie provinces, westerners traditionally have not been deeply concerned about the federal-provincial distribution of powers. "Western political protest has always been more concerned with the way in which Ottawa has carried out its constitutional responsibilities than the scope of those responsibilities."[22] Against the background of those characteristic reactions toward constitutional matters, Gibbins concludes:

> Western Canadians were ill-equipped for the constitutional bargaining of the past several years. In the absence of a co-ordinated, forceful and carefully articulated western argument, the reform of national political institutions slipped off the constitutional agenda. In its stead, mere refinements of the

existing federal order, designed to safeguard provincial powers, came to the fore, refinements such as provincially-controlled constitutional limitations on Ottawa's declaratory, emergency and spending powers. Lacking an alternative constitutional vision, western provincial governments fell into a largely defensive posture, protecting an institutional status quo that should not have been defended, not in its present form, and not by the West.[23]

In the absence of a distinctively western "constitutional vision," the constitutional agenda in the period between 1960 and 1976 was monopolized by conflicting sets of proposals to come to terms with the evolving circumstances of French-English duality. Neither of these two thrusts met interests which were specifically western. Alternatively, the move to strengthen provincial powers did not consider the need for Canada — in order to remain in any real sense a nation — to retain exclusive or at least crucial jurisdictional responsibilities with respect to such matters as tariffs and international economic relations, interprovincial transportation, the taxation of corporations, and so on. In these respects, basic western interests could be safeguarded only by influencing the ways in which such federal powers were exercised. The contradictory alternative of enhancing the status of both official languages through Canada and the status of French in federal institutions was at best of marginal concern to the West because of the relatively small number of francophones in that region. Thus, in the period prior to 1976, specifically western interests were neither clearly articulated nor forcefully pressed in the process of constitutional review.

It is not difficult to understand the recent attractiveness of intrastate federalism for western Canadians. Westerners are a permanent minority in the operations of the central government. This minority status was buttressed by the disposition of the West in the period before 1984 to elect opposition rather than government members to the House of Commons. In the three general elections of 1972, 1974 and 1980 in which Liberal governments were returned to power, there were only 22 Liberals elected in the 213 seats at stake in the four western provinces (none of them from an Alberta riding). And in the 1980 election, there were only two Liberals (both from Manitoba) elected from 77 western seats. During the latter years of the 1970s and the early 1980s, the growing strength of the resource-based economies of the western provinces, leading to a westward shift in Canada's centre of economic gravity, augmented the western perception that Ottawa was determined to control the region's economic development to western disadvantage. The governments of these provinces did assert their jurisdiction, particularly with respect to natural resource, by commissioning in the late 1970s a working group to monitor federal "intrusions" on provincial responsibilities, broadly defined in annual reports. However, there was, unlike in Quebec, little sentiment that specifically western interests could be effectively protected through provincial action alone. It is somewhat unfortunate that

the term "western alienation" has gained common currency. Political alienation is generally thought to be estrangement from a political order which is perceived to be both incomprehensible and hostile. Yet, as Gibbins points out, "The major thrust of western sentiment has been for greater participation in and recognition by the national government."[24]

Western disposition toward intrastate solutions was a result of very specific conditions in the late 1970s and early 1980s; those conditions are likely to change with a consequent weakening of pressures for intrastate reform following the 1984 election. The substantial number of western MPs on the government side of the House may now contribute to the perception of federal government as more responsive to western values and interests. In addition, with the resource-based economies of the western provinces in less favourable circumstances than before, the confidence and aggressiveness of the people and governments of the region in pressing for a shift of political power westward may be expected to decline.

While proposals for intrastate reforms have been particularly congruent with the interests of the West, they have also been part of a broader development. The provincial governments, acting either individually or in regional groupings, have attempted to influence matters almost exclusively within Ottawa's constitutional jurisdiction.[25] Increasingly, they are joining forces to do this. In retrospect, this appears as an almost inevitable resultant of the jurisdictional conflict between two orders of government which are both competent and aggressive. Under the constitution as judicially interpreted, there are several devices by which Ottawa may encroach upon matters otherwise within the range of provincial powers. These include reservation and disallowance, the exercise of the spending power, the declaratory power, the power to withdraw the adjudication of matters involving federal law from courts under provincial administration, and so on. Further, and with some qualifications, it can be stated that recent judicial review of the constitution has tended to reinforce federal powers as against those of the province.

In this jurisdictional struggle, the provincial governments have few constitutional resources. In compensating for this, they have relied on the political device of pressing their interests on the basis that they represent the legitimate interests of Canadians even in respect to matters where the constitution confers overriding or exclusive jurisdiction on the federal authorities. This disposition has been buttressed by the increasingly widely shared perception that during the 1970s and early 1980s the central government itself was deficient in its capacity to articulate and reconcile regional interests.

In the period after 1976, the federal government itself showed a renewed interest in intrastate reforms. The Constitutional Amendment Bill, commonly known as Bill C-60, was introduced into the House of

Commons by the government in June 1978. Bill C-60 was a draft of a revised constitution including a Charter of Rights, a delineation of powers between Parliament and the provinces, and a constitutional statement of much of the law and convention of the constitution related to the Crown, the cabinet and Parliament. On the intrastate side, there was a reform which would replace the existing Senate by a House of the Federation whose members would be chosen half by the party leaders in the House of Commons and half by party leaders in the provincial legislature in proportion to the relative standings of those parties in a preceding federal or provincial election. A complex procedure was added whereby the provincial and federal governments together would choose members of an 11-person Supreme Court with powers and jurisdictions as specified in the constitution.

Bill C-60 divided the constitution into parts which were believed to be amendable by Parliament alone and parts requiring joint action by Ottawa and the provinces. The federal authorities believed that the intrastate changes contained in the bill related to a new kind of second chamber and that reforms related to the Supreme Court fell in the former category. However, in response to the request of a special Joint Senate and House of Commons Committee on the Constitution, the government submitted to the Supreme Court of Canada a reference as to whether Parliament alone might abolish the Senate or change its powers. In 1980, the Court published its decision that Parliament did not have such powers.[26] Further, at a first ministers' conference on the constitution held in late 1978, the provincial governments failed to agree to Ottawa's proposals for a new division of powers, the discussion of which had been the provincial prerequisites for any discussion of constitutional reform.

The introduction by the federal government of the Canadian economic union issue into the constitutional negotiations of the summer of 1980 was in a somewhat indirect sense a new kind of assertion of intrastate thinking. T.J. Courchene points out that, on the matter of the economic union, Ottawa proposed not to remove all barriers to the free movement of capital, goods and people within the boundaries of Canada, but only those erected by the provinces. It insisted that the federal authorities could and should continue to meet the particular needs of regions through, for example, industrial incentive grants and measures requiring the preferential employment of local persons in projects involving the federal government.[27] On this basis, Ottawa asserted its right and duty to meet local and regional needs.

Three general points can be made about the directions that the process of Canadian debate upon constitutional reform has taken since 1976.

First, unlike during the previous decade, the major impetus in this debate has come not from Quebec but from English-speaking Canadians and national groups. This was not because the Parti Québécois govern-

ment was unconcerned with constitutional matters but because of the psychological difficulty of pursuing simultaneously both sovereignty-association and constitutional reform within the existing system. Consequently, there has been only one major analysis of the Canadian constitutional system from a federalist point of view emanating from Quebec in the latter period; this was the Beige Paper published by the Quebec Liberal party in 1980.[28] This is to be contrasted with the very large body of such analysis originating elsewhere: the Report of the Canadian Bar Association on the Constitution in 1978,[29] the Pepin-Robarts Report of 1979,[30] a major study by the Canada West Foundation in 1978,[31] reports of the Ontario Advisory Committee on Confederation in 1978 and 1979,[32] a series of documents and analyses published under the auspices of the government of British Columbia in 1978,[33] the study *Regional Representation* by Gordon Gibson, Ernest Manning and Peter McCormick in 1981,[34] and the book *Regionalism* by Roger Gibbins in 1982.[35] The relative absence of Quebec-centred views from the recent constitutional debate has paralleled the impotence of the Parti Québécois in influencing the directions of Canadian constitutional evolution.[36]

Secondly, to the extent that Confederation has been perceived to be in crisis, this crisis has been regarded as concerning more than solely French-English relations. The Pepin-Robarts Report in 1979 put it this way:

> We believe that the heart of the present crisis is to be discovered in the intersecting conflicts created by two kinds of cleavages in Canadian society and by the political agencies which express and mediate them. The first and most pressing cleavage is that old Canadian division between "the French" and "the English.". . . The second cleavage is that which divides the various regions of Canada and their populations from one another.[37]

This kind of formulation, which emphasizes regionalism as well as cultural duality, has become the new conventional wisdom of Canadian constitutional debate.

Thirdly, there has been a new emphasis on intrastate reforms. Particular intrastate proposals are analyzed as this study proceeds, and it is enough to say here that the most prominent of these proposals have suggested a new kind of second chamber of Parliament to replace the existing Senate and reforms in the electoral system by which members of the House of Commons are chosen.

The Assumptions of Intrastate Federalism

The new ways of looking at the Canadian constitutional system are crystallizing into a relatively coherent body of assumptions. It would, however, be an error to exaggerate the extent of agreement among supporters of intrastate reforms.

Alan Cairns makes a useful distinction between what he designates the "provincialist" and "centralist" versions of intrastate federalism.[1] The first is a straightforward assertion that the power of the provincial governments to control certain operations of the federal government should be enhanced. Centralist intrastate federalism is based on the contrary premise that the power and legitimacy of the national authorities are unduly weak and can be strengthened only by making the central government more representative of and responsive to non-governmental provincial interests.

Although these two variants appear in a logical sense to be contradictory, some intrastate reformers accept both on the argument that only the strengthening of provincial government powers at the centre will enhance the legitimacy of the national government. Thus an Alberta government document published in 1982 and very much in the spirit of what Cairns describes as provincialist intrastate federalism asserts:

> Alterations to institutions such as the Senate and the Supreme Court could ensure that these institutions better reflect the diversity of the country by providing for provincial input into national policies. Furthermore, reforms to our national institutions could have important symbolic value just as patriation itself has had. Reforms which provide for the expression and protection of provincial views and interests within the national policy making process could significantly alter public perceptions towards these institutions and thereby contribute to Canadian unity.[2]

There are other disagreements among intrastate reformers, too, which might be shown by a comparison between the two most comprehensive analyses along these lines, the study *Regional Representation*[3] (hereafter cited as the McCormick-Manning-Gibson report) and Roger Gibbins' book *Regionalism*.[4] Both these analyses espouse the centralist variant and do not differ radically in their diagnoses of the deficiencies of the existing federal order. However, there are marked differences in prescriptions. In the final chapter of his book, Gibbins mentions but does not elaborate on in much detail a battery of intrastate reforms: an elected Senate, changes in the electoral system for the House of Commons, improved regional representation in federal regulatory agencies, and the weakening of party discipline in the Commons. The McCormick-Manning-Gibson report on the other hand discusses various intrastate recommendations and judges that, apart from an elected Senate, these are undesirable or would contribute little to remedying the existing institutional deficiencies.

Despite the disagreements mentioned above, there appear to be certain common operating assumptions adopted by the advocates of intrastate federalism (perhaps more directly applicable in their entirety to the centralist than to the provincialist variant).

Proposition 1: The institutions of the national government have operated in an unduly centralized and majoritarian way. A report published under the auspices of the Canada West Foundation in 1978 says:

> We . . . have the most centralized structure of national government among the world's free federations, with the prime minister appointing the governor-general, lieutenant governors, the cabinet, members of the Senate, and the supreme court: in fact, the entire structure of the central government with the sole exception of the House of Commons.[5]

The McCormick-Manning-Gibson report is more concerned with the majoritarian biases of central institutions than with the power of the prime minister as such, and asserts:

> Just as the "representation by population" agitation undermined the political stability of the pre-Confederation province of Canada, so the preoccupation with the majoritarian implications of "one person, one vote" must undermine the workability of any system that is truly federal in the sense of containing considerable diversities and cleavages that have organized themselves on a territorial basis.[6]

Proposition 2: The power and legitimacy of the central government have been compromised because the government has not provided an effective outlet for territorially based interests. This proposition derives its force from the difficulty which successive federal governments had during the decade prior to 1984 in obtaining broad-based electoral support from all regions. In the opening sentences of his 1979 study *Does Canada Need a New Electoral System?* W.P. Irvine writes:

Canada's central institutions face a crisis of representation. This has led to a marked loss of legitimacy and hence authority of the federal cabinet, the federal parliament and the federal judiciary. They are less able to carry through the kinds of accommodation necessary if the country is to survive.[7]

He asserts later in his study:

A large measure of the current alienation from [the] federal government comes from the fact that its formal power exceeds its real social power. Governments act, and must act, on behalf of the whole country but they do not have support from a majority of the voters, nor do they have caucus representation from large segments of the society.[8]

Proposition 3: Because central institutions have so frequently inadequately reflected provincial and regional interests, the powers of the provincial governments have increased and can be contained only by making the government of Canada more representative of and responsive to such interests. Donald V. Smiley, in a 1977 article, writes:

Canada cannot effectively be governed unless Ottawa is the focus of significant popular identification and the political arena in which the interests of powerful groups are resolved. Yet territorialism is the dominant circumstance of our political life. The institutional imperative then is to so modify our political structures as to secure the more effective channelling of territorially-demarcated attitudes and interests through the central government rather than the provinces alone.[9]

The first report of the Ontario Advisory Committee on Confederation, published in 1978, examines the broad alternatives for constitutional reform as "either a wholesale decentralization of power in favour of regional and provincial autonomy or fundamental reform of federal institutions to make them more responsive to regional concerns and interests in the evolution of national policy."[10] The committee report rejects decentralization which would "risk further fragmentation of the country and would leave the economically weaker parts even more vulnerable than they are today." The preferred option in the report deals with:

. . . constitutionally involving the provincial governments in the formulation of, and responsibility for, national policy decisions, as well as the reorganization of vital national institutions such as the Supreme Court and the major regulatory agencies.[11]

Proposition 4: The present structures lead to an unacceptable amount of conflict between the federal and provincial governments. The McCormick-Manning-Gibson report states:

Our national governmental institutions are more suited to a "politics of confrontation" than to the "politics of accommodation" more appropriate to the pressures of a federal country. Part of this can be attributed to the centralization of power inherent in the logic of the parliamentary system.

but it has been aggravated by a failure to build any effective off-setting institutions.[12]

In his 1979 paper, Gordon Robertson deplores the kinds of federal-provincial conflicts attendant on the increasing disposition of the provincial governments to involve themselves in matters within federal jurisdiction. He attributes this situation to the lack of "an effective forum for open regional advocacy and brokerage within our institutions at the federal level of government."[13]

Proposition 5: *It is necessary and desirable that individual Canadians be represented in the institutions of the central government by virtue of their membership in provincial communities as well as their residence in federal constituencies for election of members to the House of Commons*. The McCormick-Manning-Gibson report makes this case:

> In the liberal democratic tradition, the stress has been on the representation of *individuals* and the evolution of Western democracies can be described in terms of the progressive extension of the franchise to larger and larger portions of the population. In recent years, the principle of "one person, one vote" has gained ever greater currency and literal application. The normal units of representation in modern democratic systems are purely arbitrary territories of more or less equal numbers of voters. . . . Within a federal system, however, a second set of logical dynamics has already been built in. . . . The more a country is possessed, not just of social diversity, but of significantly different groups that occupy different geographical areas, the more it will be necessary to operate the formal governmental structure in a fashion which acknowledges and responds to these diversities. This implies that in a federal system, a majority must mean more than 50% + 1, but rather must comprise a regionally sensitive consensus on a wide variety of crucial issues.[14]

Although the report is named *Regional Representation*, its authors are explicit in stating that the existing provinces are the appropriate units to be represented in the national government.

Roger Gibbins' *Regionalism: Territorial Politics in Canada and the United States* is a major contribution to the literature of intrastate federalism. The task Gibbins sets for himself is to explain the nationalization of American politics and the relative decline of territorial political conflict in the United States while territorial politics have continued to be dominant in Canada. There is a strong current of analysis in contemporary social science to the effect that the process of modernization leads inexorably to political centralization and the displacement of territorial cleavages by conflicts based on other axes, most importantly social and economic class.[15] This kind of analysis has been used to explain the dominance of Washington in the American system of politics and government. Yet Canada is also a modernized country and, by several criteria, its politics have become more rather than less territorial. To name some examples: federal and provincial party organizations have

become increasingly independent of one another; an individual's place of residence is often one of the most useful predictors of his or her voting behaviour; and political elites sustain — and are sustained by — territorial differences, and they exploit these differences to the neglect of other cleavages.

Gibbins' general conclusion is that the differences between the impact of territorialism on the American and Canadian political systems are to be explained for the most part in terms of the divergent characteristics of the political institutions of the two countries:

> To a very great degree political systems shape their own destiny. The course of political development may have less to do with changes in the socio-demographic setting of politics, such as changes in urbanization and modernization, and more to do with the character of political institutions themselves. These do not merely reflect external environmental change, they are important and at times decisive actors in societal evolution and certainly in the evolution of the political system itself.[16]

Thus:

> Political variables are of primary importance in explaining both the persistence and growth of territorial conflict in Canada and its virtual disappearance in the United States. . . . The Canadian-American difference is not adequately explained by national differences in socio-economic composition.[17]

In Gibbins' analysis, the major political variable in explaining the differences between territorialism in the two countries is their relative effectiveness. The American system is able to channel spatially delineated interests within the central government, whereas the Canadian system is noted more for the absence of "adequate regional representation within the institutions of the national government." He is clearly within the camp of those whom Cairns has designated as centralist intrastate federalists, for he says:

> Any reform designed to strengthen regional representation within federal political institutions in Canada should be recognized as a strategy to strengthen, in the long run, the national government at the expense of the provincial governments.[18]

Gibbins emphasizes that the strengthening of Ottawa's power is the likely long-run result of intrastate reforms. In the immediate future, Gibbins predicts that such changes will weaken the federal cabinet's control over the national government while provincial political leaders will not be subjected to corresponding institutional obstructions. He continues:

> However, the general conclusion is reached. The American experience suggests . . . that over the long run more effective regional representation will strengthen the position of Ottawa vis-a-vis the provinces, even though

the federal cabinet's power over Ottawa would be diminished. Thus to strengthen Ottawa the federal cabinet will have to loosen its grip on national power. The transition faced will not be an easy one.[19]

To summarize, Gibbins' argument is that the federal cabinet's power would be weakened. Presumably, such reforms as an elected Senate and changes in the electoral system would make majority governments less frequent than now, but, in the long run, these changes would enhance the power of the whole complex of national political institutions by increasing their legitimacy.

In our view, Gibbins somewhat exaggerates the impact of the intrastate federalism in the central government upon the nationalizing of American government to the neglect of other circumstances contributing to that broad result. The existence of 50 states as against 10 Canadian provinces would apper to have *some* effect on strengthening the relative powers of Washington in comparison with those of Ottawa. At the state level in the United States as well as in the national government, there is a fragmentation of power. The unchallenged power of the national authorities over the military-industrial complex allows these authorities to allocate resources among the states in a way without parallel in Canada. Because Gibbins neglects such factors, he appears to exaggerate the possible impact of reforms of central institutions in restricting the powers of the provinces and nationalizing the Canadian governmental system. Nevertheless, despite these weaknesses, the analysis in his book provides many valuable suggestions.

Intrastate Federalism in Canada:
Critiques and General Perspectives

As described in Chapter 2, intrastate analysis has come to include a relatively coherent set of assumptions about how the Canadian system of government works and how it might be reformed to work better. These assumptions are likely to have a significant influence on Canadian constitutional thinking and to change in the foreseeable future. This chapter makes a critique of intrastate analysis in order to provide a coherent perspective for our examination of particular institutions and processes in later parts of the study and to guide our specific proposals for reform.

There is a consensus among students of Canadian affairs that there are fundamental deficiencies in the structures and processes of governmental decision making, particularly as these relate to economic matters. This consensus is reflected in the mandate given to this Royal Commission. This mandate may be contrasted with the Terms of Reference of the Royal Commission on Canada's Economic Prospects, also known as the Gordon Commission, appointed in 1955. This commission's work was confined to economic matters, and its research staff was made up almost exclusively of professional economists. Underlying this activity of 30 years ago was the assumption that Canadian economic problems consisted essentially of choosing among substantive economic policies and that the way in which power was organized within the Canadian community did not impose any significant obstructions to the making of such choices. On this basis, the only important institutional change recommended by the commission was to establish a body akin to the Council of Economic Advisers which reports to the U.S. president.

Although there is consensus that the Canadian system of governmental decision making is inadequate, there is no agreement on the precise nature of those deficiencies or the desirable and possible ways to

overcome them. A number of generalizations can be made about this system.

First, in comparison with other western democracies, the institutional infrastructure for aggregating and articulating interests both governmental and non-governmental is weak and fragmented. Canada is the least likely candidate for corporatism,[1] if corporatism is defined as a regime in which representatives of government, business, labour and agriculture collaborate in the making of macroeconomic decisions. The fact is, each of these "estates" is fragmented: that of government between federal and provincial jurisdictions; the private business sector among domestic and foreign-controlled industries, manufacturing and resource development, importers and exporters, large and small business, and so on; and the labour union movement between national and international unions, French-speaking and English-speaking groups of unions. In response to this fragmentation in the non-governmental sector, the federal authorities have from time to time given financial and organizational support to private groups: native peoples, consumers, women, associations in the cultural and athletic fields, and so on. However, with respect to fundamental economic choices, there is a relative absence of institutions for gathering together and articulating these interests.

Secondly, Canadian political parties by and large play a very restricted role in committing government decision makers to particular policies. The lack of ideological distinction between the two major national parties denies the voters the opportunity to make choices related to fundamental directions of policy in general elections. Unlike their counterparts in many other western democracies, the extra-parliamentary elements of the Liberal and Progressive Conservative parties are not decisively involved in policy formulation, and their research capabilities are very much underdeveloped. This gives the parliamentary leaders of the parties almost unfettered discretion in committing those parties — and when in office, the government — to particular policies. Consequently, Canadian voters are denied the opportunity to choose among distinct complexes of policy alternatives in general elections. It is not true, of course, that the Liberal and Progressive Conservative parties are non-ideological; rather they are not in a significant sense ideologically distinct from one another. The ongoing organizational separation of the national parties and their provincial wings means that the parties as such have negligible capacity for effecting federal-provincial harmonization in policy matters.[2]

Thirdly, the federal and provincial governments are locked into an unending struggle for jurisdiction and money which extends to an ever-increasing number of areas of public policy. The phenomenon is well recognized among observers of Canadian affairs and requires no further

comment. The intergovernmental struggle has crucial consequences for the articulation of non-governmental interests. There is a very fragmentary structure for the aggregation of spatially delineated interests not coincident with the boundaries of provinces, for example, for urban agglomerations and for transprovincial and sub-provincial regions. Richard Simeon also demonstrates that, when certain matters get into the arena of federal-provincial negotiation, non-governmental interests tend to be locked out.[3]

Intrastate reformers are concerned with a particular kind of institutional deficiency, the perceived failure of the institutions of the central government to be representative of and responsive to regional interests and values.

One of the basic tenets of intrastate thinking, particularly in its centralist variant, is that the federal government is weak and that the weakness is overwhelmingly attributable to its lack of regional representatives. Irvine asserts that because of this deficiency, and the resultant alienation of the Canadian people from their national government, Ottawa's "formal power exceeds its real social powers."[4] In a similar vein, Simeon concludes "A national government must *be* national, it must have the political support and legitimacy to exercise the power claimed for it."[5] It is not completely clear whether he was writing in the indicative or imperative mood. Cairns in his 1979 paper makes an effective rejoinder:

> The weakness of Ottawa is much exaggerated. The impression and reality of irresolute federal leadership characteristic of the late Diefenbaker years has been in part if only intermittently reversed in the Trudeau era.[6]

Cairns mentions such examples of resolution with respect to the FLQ crisis of 1970, anti-inflation measures during the mid-1970s, and policies related to cablevision and natural resource royalties. The Trudeau government after its restoration to power in 1980 was even more assertive. Although only two Liberal MPs were returned from the West, the government was not dissuaded from acting decisively on issues of specific interest to the West, as in the cases of the National Energy Policy, the Crow's Nest Pass freight rates and the French language issue in Manitoba. Ottawa's weakness *has* been exaggerated. Irvine's assertion might be more accurately paraphrased, "the federal government's constitutional powers exceed its willingness to press those powers to their limits." A federal government determined to exercise all the legal powers it possessed could find the jurisdiction to do what none of its peacetime predecessors has done through reservation and disallowance, the declaratory power, the aggressive use of the spending power, the extension of jurisdiction over the criminal law in respect to economic regulation, the exercise of peacetime emergency powers in economic

matters, and so on. The fact that recent governments have not used their constitutional powers in effect to destroy federalism does not demonstrate Ottawa's weakness.[7]

Cairns also takes issue with the common intrastate argument that the strength and assertiveness of the provinces was primarily a result of federal unresponsiveness:

> Contemporary provincial power is much more than a by-product of Ottawa's insensitivity. It is based on the jurisdictional possession of the growth areas of government, the increasingly competent bureaucracies at their disposal, the extensive funds over the disbursement of which they preside, the ambitions of their political and bureaucratic elites to maintain and expand the financial empires under their control and generally by their extensive capacity to reward and punish the interests and forces their policies encounter. In brief, they are powerful because the working constitution of Canadian federalism has transformed them into decisive agencies for manipulating their environment.[8]

This analysis is essentially accurate. The existing circumstances of federal-provincial conflict are not primarily a reflection of the unrepresentativeness of federal institutions. Rather, this is a manifestation of the clash of interests between two orders of government with both the will and the capacity to press their interests against each other. Increasingly, too, this struggle is waged with reference to conflicting premises about what kind of political community Canada is and should be. Various kinds of intrastate reform would alter the relative strength of the combatants and change the arenas in which the combatants meet. Yet it is unrealistic to expect, as does the McCormick-Manning-Gibson report, that such reforms would radically reduce the level of federal-provincial conflict and replace this with "a regionally sensitive national consensus" on major federal policies.

In general, then, intrastate thinking has exaggerated the influence of the regional unrepresentativeness of central institutions in determining the federal-provincial balance as well as the capacity of intrastate reforms to shape a new balance. Further, intrastate analysts have neglected the executive side of the federal government and concentrated on reforms of the second chamber, the electoral system, the House of Commons and the Supreme Court of Canada. On this basis, we argue later in this study that, if the federal apparatus is to be made more responsive to regional interests and values, there will have to be changes in the structure and operation of federal executive power.

Strengthening Central Decision Making

A major objective of intrastate reformers is to enhance the legitimacy of the central government. Certainly, there is evidence that a very large number of Canadians believe that this government is remote from them;

that it is unresponsive to their wishes and needs; and that, apart from residents of the Ontario heartland, the federal apparatus is weighted against their interests as residents of particular provinces and regions. Yet, there are alternative explanations of these feelings that are not directly related to the regional unrepresentativeness of central institutions.

First, the weakened legitimacy of Ottawa may be part of a much broader movement challenging the power of the state authorities throughout the Western world. In dramatic terms, the American social philosopher Robert Nisbet describes this movement as a "new Reformation" akin to the challenges facing the Church beginning in the sixteenth century and writes:

> Today we are present, I believe, at the commencement of the retreat of the state as we have known this institution for some five centuries. . . .[9]

If Nisbet's bold assertions are essentially accurate, the question remains, why does the federal government appear to have borne so much of the revolt against the state authorities and why, in a relative sense at least, have provincial and local authorities not been subject to the same degree of challenge? The explanation is not easy. It is certainly not because all these sub-national units of government are small, intimate and "close" to their people; in the larger provinces and cities, the governmental apparatus is large, impersonal and bureaucratized. A somewhat more plausible explanation may lie in the division of functional responsibilities between the sub-national authorities and Ottawa. There is a direct link between the federal government and millions of individual Canadians through various income support programs such as family allowances, the Canadian Pension Plan, unemployment insurance, old age security and general income assistance to senior citizens. But apart from these programs, most citizens have few direct dealings with federal authorities, except through the increasingly unpopular activities of those responsible for the collection of taxes on individual incomes. On the other hand, the provincial and local authorities provide most of the public benefits of which citizens are immediately aware, such as schools and universities, police and fire services, parks, roads, public libraries, hospital and medical insurance, many forms of income assistance, and so on. Even in circumstances where the federal government provides assistance toward such benefits through financial transfers, the recipient provinces have been relatively successful in disguising this from the citizenry. Furthermore, the provincial administrations have incentives of their own for de-legitimizing the federal government and important resources of their own for pursuing this objective.

Secondly, contemporary methods of public decision making make the central government unresponsive to interests and values not emanating from within the governmental system. A plausible argument can be

made that the new decisional technologies — Program, Planning and Budgeting System (PPBS), Management by Objectives, electronic data processing, and so on — are inherently weighted against political sensitivity. Further, the increasing importance of intergovernmental interactions in the policy process has a tendency to deny political actors other than government a significant influence in such matters. In his examination of three major sets of decisions made within the federal-provincial framework — decisions related to the constitution, fiscal relations and public contributory retirement pensions — Simeon concludes: "In no case did interest groups have a significant effect on the outcome, once the issue had entered the federal-provincial arena."[10] Edward A. Carmichael and James K. Stewart come to the same position in their critique of the National Energy Program, and find that the major decisions relating to NEP were negotiated between the Alberta and federal governments with little influence from other interests, most crucially from the petroleum industry.[11] In very general terms, the new decisional processes have a disposition to make governments insensitive not only to regional values and interests but also to all interests other than those of governments themselves.

Thirdly, during the decades prior to 1984, the ongoing assimilation of the apparatus of the federal state to the national Liberal party may have to a greater or lesser degree encouraged the alienation of Canadians without Liberal allegiances from their central government. Reginald Whitaker in his perceptive analysis of the Liberals between 1930 and 1958 describes how ". . . the party became less and less distinct as an entity, its separation from the state system and the private sector more and more blurred."[12] This process continued in the period after the Liberals returned to power in 1963, and there was an assimilation not only of state to party but also of state to government, as is demonstrated by the new designation of federal agencies as Revenue Canada, Transport Canada, Canada Post, and so on. Further, in the Trudeau era there was adopted an official view of what Canada is and should be. Although there was apparently no impulse to establish a parliamentary Committee on Un-Canadian Activities, certainly those citizens who were, for example, Quebec nationalists or who rejected official bilingualism were defined by those in power in Ottawa as being Canadians in less than a complete sense. Put broadly, the assimilation of party to state to government along with a new and official definition of the country inevitably resulted in a considerable disaffection of significant elements of the Canadian population from their central government.

What we have written above does not imply that we reject the intrastate analysis outright. Rather we argue that such analysis has tended to explain too much about the Canadian political system and thus to exaggerate the extent to which this system is susceptible to change through intrastate reforms alone. Nevertheless, there is an elemental

problem in the Canadian constitutional and government order. This problem relates to the difficulty if not the impossibility of reconciling the majoritarian dispositions of the Westminster model of parliamentary responsible government with the pluralistic and anti-majoritarian impulses that — in Canada as elsewhere — made federalism necessary in the first place and sustain federalism today.

Federal government concerns the protection and articulation of spatially delineated values and interests within a more comprehensive political community. For this protection, there are two possible strategies. The first is that of interstate federalism, which confers on the states or provinces the constitutionally protected jurisdiction over matters which members of some or all of the constituent communities believe to be most crucial to their welfare and survival. The second, the intrastate strategy, provides for the protection of these territorial particularisms within the structure and operations of the central government itself. The formation and subsequent development of federations indicate that generally these strategies have been considered complementary rather than contradictory.

Canada was the first political community to combine the Westminster model of parliamentary government with federalism. The Confederation settlement, as negotiated among the politicians of British North America between 1864 and 1867, contained a mix of interstate and intrastate elements. The French-Canadian leaders demanded as a price of union a federal regime in which the Quebec government would have jurisdiction over those matters deemed most essential to the welfare and continuing survival of the majority community within that province, most importantly, control over education and the system of private law. But there were important intrastate elements as well, the most crucial being equal membership of each of the three sections in the Senate and the understanding that the federal cabinet would be representative of the provinces and regions.

In the past 20 years or so, two broad developments have occurred to alter the interstate-intrastate blend adopted at Confederation, which subsequently gave the federal system a relatively high degree of stability and popular legitimacy. On the interstate side, there has been a breakdown in the division of powers and responsibilities specified by the constitution and subject to the ongoing process of judicial review. In retrospect, the Fathers of Confederation appear to have been somewhat naïve in their general belief that there was a clear-cut and easily recognizable distinction between those matters which were national and those which were in the parlance of the day "local." In recent decades, the federal authorities have through various devices and strategies involved themselves in a very large number of activities which were within the scope of provincial legislative jurisdiction. And increasingly, the provincial governments have asserted their right to influence policies which are

within Ottawa's jurisdiction, according to the constitution as judicially interpreted. No longer does the constitutional distribution of powers, as subject to ongoing delineation by the courts, separate out the functions of government between two relatively autonomous orders.

On the intrastate side, we argue in succeeding chapters of this study that major national institutions — the executive, the House of Commons, the Senate and the political parties — have been relatively ineffective in assembling and speaking out on specifically regional interests. With respect to two of the national institutions where regional advocacy is most effective — the cabinet and the parliamentary caucuses of the parties — such advocacy for the most part takes place within a context of secrecy. This makes the central political system appear less responsive to regional interests and values than in fact it is.

The Westminster model of parliamentary responsible government imposes important obstacles on the protection of certain interests. One might say that the pervasive disposition of this governmental system is majoritarianism. Yet it must be recognized that majoritarianism is used here in a precise and somewhat restricted way. We are not defining this term to denote popular majorities in general elections, for in the 20 such elections between 1921 and 1984, inclusive, only three resulted in awarding more than 50 percent of the popular vote to the winning party, namely in 1940, 1958 and 1984. Furthermore, so far as particular policies are concerned, survey research is a somewhat inadequate tool to measure the levels of popular support. By majoritarianism, we mean no more and no less than the power, under the Westminster model, of those who can control the executive while sustaining majorities in the House of Commons to override whatever interests get in their way.

Responsible government is, however, a flexible instrument; otherwise, it would not have survived in Canada and other Commonwealth nations under such very divergent circumstances and over such long periods of time. Certainly the understanding of contemporary Canadians for responsible government is very different from that of Robert Baldwin and Louis-Hippolyte Lafontaine, two pre-Confederation leaders. The first prime minister, John A. Macdonald, and his nineteenth-century colleagues believed this regime required a civil service appointed through patronage. Wilfrid Laurier might well have believed responsible government to be incompatible with the significant number of officials on the executive side of the present federal government who serve for fixed terms and during good behaviour. Moreover, like other constitutional conventions, those of responsible government do not provide unambiguous guides to all situations. Competent and disinterested observers of Canadian affairs will and do disagree about how the general principle relates to a number of areas. Examples are such issues as the reserve powers of the Crown; the limits of independence from political control of public corporations and regulatory agencies; various issues

related to secrecy and freedom of information in communications within the executive side of government; and the propriety or otherwise of cabinet ministers who, in declaring their candidature for the leadership of their party, announce that the directions of government policy would change if they became prime minister.

Although the principle of responsible government is flexible, it is not of course infinitely so. Its basic requirements are that the executive monopolizes the major functions of governing, that the executive speaks with a unified voice, and that the executive is accountable to the House of Commons alone. In his *Representative and Responsible Government*, A.H. Birch notes that:

> The most important tradition of British political behaviour is the tradition that the government of the day should be given all the powers it needs to carry out its policy.[13]

Like Britishers, most Canadians believe that governments should have both the capacity and the will to govern. It is a chicken-and-egg question to ask whether this belief is a result of the regime of responsible government or its cause. The American political formula is based on contrary premises. Although the U.S. formula asserts popular sovereignty, there is a complex of institutional obstructions to the formation of popular majorities. And within the governmental system itself, there is an intricate system of checks and balances. It seems that Americans assume that those who possess power have inherent and ineradicable impulses to challenge both individual rights and the general welfare and therefore that limits must be placed upon their authority. The Westminster imperative is the contrary one: "Put all your power-eggs in one basket — and watch that basket!"

The thrust of the Westminster model toward decisive and unified leadership means that minorities can be overridden and that they have relatively few resources to frustrate the will of the majority, as embodied in the policies of the incumbent government. Yet this system is demonstrably capable of eliciting a high degree of legitimacy if it is widely perceived that there are no permanent majorities and minorities, that majorities and minorities form and re-form around different political issues, and that regional or other groupings perceive that they — though temporarily or permanently disadvantaged in respect to certain matters — may form part of an advantaged majority in respect of others.

But in the period prior to the 1984 federal election, this circumstance to a large degree appeared to have ceased to exist in Canada. Many Québécois believed that the central government was consigning them to a state of permanent minority, and that their vital interests have been, are and would inevitably be sacrificed; and similarly, many westerners asserted that they were permanent victims of the central Canadian concentration of power and numbers. In such cases, it is perceptions

that are important, even though a careful study may well reveal that there are very few issues dealt with by the federal government where the interests of westerners and Québécois are juxtaposed to those of the rest of the nation.

If the institutions and processes of central decision making are to be made more responsible to regional values and interests, there must be some modification of the majoritarian nature of Ottawa's power. In later chapters we will make specific recommendations in this general direction. There has been a good deal of discussion about the urgency of more regional "input" into the decisions of the central government. Yet, in any genuine sense, input means more than merely bringing the wishes and needs of all regions to the attention of national decision makers. After all, members of the cabinet and senior members of the public service travel extensively throughout the country, so presumably there are persons in the Prime Minister's Office and ministers' offices who are engaged in the systematic clipping of the *Edmonton Bulletin* or the Halifax *Chronicle-Herald*. In the House of Commons, at federal-provincial meetings and in other forums, the interests of all parts of the nation are brought to the attention of the powerful in Ottawa. What "effective regional representation" does mean is that those who represent interests which are regionally specific have the power to obstruct national majorities that are deemed hostile to those interests. But this power of obstruction inevitably weakens the majoritarian dispositions of parliamentary responsible government as Canadians have come to operate this system. In brief, attempting to reconcile intrastate federalism with the Westminster model is akin to trying to square the constitutional circle.

Important questions remain to be discussed:

- What will be the probable impact of intrastate reforms on the federal-provincial balance?
- Will intrastate reforms not result in undue obstruction to the governmental process in Ottawa and to ineffective government?
- What rationale can be given for conferring power to obstruct national action on regionally specific interests and not on other groupings of sentiment or interests?

Intrastate reformers of the centralist variant assert that Ottawa's legitimacy has been compromised because of the lack of regional representativeness in the institutions of the central government. According to this general line of analysis, it is asserted that the provinces have assumed the role of being the almost exclusive channels through which regional interests are articulated. Somewhat paradoxically, such reformers assert that the provincializing dispositions of the existing situation can be remedied only by curbing the power of the central government to enact the national will. Yet it is at least possible that thoroughgoing intrastate reforms could further provincialize the Canadian system of

government. One of the circumstances of contemporary executive federalism is that government leaders, especially first ministers, can speak for and commit their respective governments. Yet certain crucial intrastate proposals, especially those for a strong elected Senate, could compromise this capacity for the federal government while provincial leaders would be free of corresponding restraints. By contrast, in the United States, the diffusion of power within the federal institutions is balanced by a parallel diffusion within the state governments where the principle of the separation of powers also operates.

The charge that intrastate changes will prevent unified and effective government action goes right to the heart of the Canadian constitutional and political tradition. In this tradition, governments derive their right to govern, within the maximum life of a Parliament as specified by the constitution, from the results of the previous general elections and from the continuing capacity of governments to sustain majorities in the House of Commons or provincial legislative assemblies. Like other systems of political and constitutional theory, responsible government has both normative and empirical dimensions. The empirical elements are that:

- the elective elements of the executive, the prime minister and his or her ministers acting in a unified way, effectively control the appointed elements of the executive;
- the confidence chamber has the will and the capacity to make the executive effectively accountable; and
- between elections, the political process is responsive to the needs and wishes of the electorate.

Informed students of the government of Canada assert that some or all of these conditions are not met, and to a large extent we share these judgments. With respect to important kinds of decisions, appointed officials are outside the effective control of their alleged "political masters." The House of Commons lacks the will and perhaps the capacity to make the executive effectively accountable. For a myriad of reasons, the governmental process is unresponsive to the wishes and needs of the governed. In short, responsible government is not all that responsible.

It is difficult to make informed judgments about the extent to which intrastate reforms would obstruct government action. We take the optimistic view that, in many if not most circumstances, the federal executive would act in a way to prevent obstruction by obtaining a higher degree of consent for projected measures than is necessary under the present institutional arrangements. For example, if the central political system had been less majoritarian, those responsible for the Official Languages Act would have had the incentive to work harder than they did to convince Canadians outside the country's heartland of the necessity of this measure, and the legitimacy of official bilingualism might

have been stronger than it now is. In more general terms, we would favour institutional measures requiring the federal executive to seek more agreement for its actions than is now required.

But a last question remains. What is the rationale for conferring on regionally specific groupings and not on other groupings the power to influence the actions of the central government? The governmental system is already biased toward territorialism through the existence of strong provincial governments with powers over crucial areas of concern and with a demonstrated capacity to influence Ottawa in matters within federal jurisdiction. Why then recommend institutional changes to further interests that are spatially specific and to disadvantage interests that are not?

The general rationale for enhancing the responsiveness of the Canadian governmental order toward regionalism lies in the imperative of system preservation. Whatever the cleavages of Canadians along other areas — class, gender, generation, ideology and so on — these conflicts will of necessity be mediated within one common political system. On the other hand, extreme regional alienation has at least the potential of fragmenting the country into two or more component regional elements. In the short-run, we believe the destruction of Confederation in such a dramatic way is unlikely. However, there is evidence that a very large number of Canadians have perceived the government of Canada to be unresponsive to their values and interests and, accurately or otherwise, that they attribute this unresponsiveness to their residence in particular provinces and regions. The rationale for intrastate reforms is to attempt to change such perceptions.

Two final points can be made in response to those who argue that the kinds of intrastate reforms we recommend in this study unduly exaggerate the bias of the system toward territorialism.

First, none of our proposals is directed toward enhancing the powers of provincial governments and legislatures at the expense of the federal government or Parliament. More specifically, we are not advocating that the existing Senate be replaced by a Bundesrat-style body composed of delegates chosen by and taking their instructions from the provincial governments; we suggest instead an elected Senate chosen by the people of the provinces. Further, in our recommendation that members of the House of Commons from the larger metropolitan areas be elected by the Single Transferable Vote system of Proportional Representation, we aim at giving those territorial areas an institutional recognition they do not now have and a channel through which their specific needs relative to national affairs can be articulated independently of the provincial governments. Under our policy proposals, the provinces may obtain some advantages in federal-provincial relations through the existence of an elected Senate. This may limit the ability of the prime minister and his cabinet colleagues to speak for and commit the federal government.

Nevertheless, the general thrust of our intrastate proposals does not enhance the relative power of the provincial jurisdictions as such.

Secondly, the Charter of Rights and Freedoms opposes specific regional interests and values, and the Charter gives Canadians important incentives to mobilize themselves on axes other than territorial ones. The claims recognized by the Charter are those of all Canadians, regardless of their province of residence. The specific nature of these claims and their ranking are to be authoritatively defined by a national institution, the Supreme Court of Canada. And in the almost inevitable conflicts about rights occasioned by the Charter and its interpretation and implementation, Canadians will be divided on non-territorial axes — those supporting and those opposing the claims of offenders against the law, native peoples, visible minorities, women, persons who express unorthodox opinions, and so on. While it is not our intention to suggest that intrastate federalism is a corrective for the anti-territorial bias of the Charter, we do argue that the bias inherent in the territorial thrust of the reforms we suggest is more appropriate than a system lacking them.
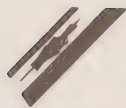
Intrastate Federalism: The Comparative Dimension

The issue of the appropriate form for intrastate federalism is by no means confined to Canada. In this chapter, we therefore examine experiences in other federations in order to provide a comparative perspective.

The concept of intrastate federalism as opposed to interstate federalism has rarely been consciously articulated as such by the founders, politicians or commentators in other modern federations. In virtually all of them, however, attention has been focussed not only upon the distribution of jurisdiction between the two orders of government but also upon the structure of the central institutions to accommodate the variety of regional and minority groups. At the Philadelphia Convention of 1787, the delegates wrestled for three months with the alternative Virginia and New Jersey proposals for central institutions. Finally, the Connecticut Compromise for a two-chamber Congress provided the resolution.

Similarly, the drafters of the Swiss Federal Constitution of 1848 were faced with one group wanting a unicameral central legislature with representation proportional to population in the cantons and the other insisting on equal representation for each canton. Despite expressions by both groups of abhorrence for "foreign institutions," the drafters concluded that the American bicameral solution was the only acceptable compromise.

The Australians in their federal constitution enacted in 1900 followed the Canadian precedent of combining a federal system with British parliamentary institutions. They nonetheless found it desirable to establish an elected Senate. This became an anomaly among institutions following British traditions of government. This elected second chamber, in which the states are equally represented, has the power to block

supply and, in certain conditions, to force an election by dissolving both houses.

The Basic Law of the Federal Republic of Germany of 1949, established as an integral part of the central institutions the Bundesrat or second chamber composed of delegates of the state governments. This institution has been described by one commentator as playing a key part "in guaranteeing the effective and cooperative involvement of the states in the German political system."[1]

The newer Commonwealth federations such as India, Pakistan, Malaysia, Nigeria, Rhodesia and Nyasaland, and the West Indies, which were established in the decades following the Second World War, also found it necessary to devote extensive deliberations to the issue of regional representation in the institutions of central government.[2]

That this should have been the case should not be surprising. The features of interstate federalism, the distribution of jurisdiction between two orders of government and, hence, the operation of autonomous state or provincial governments able to maintain regional distinctiveness are essential to any federal system. Equally important are the central institutions with an overarching sense of community among the regional groups. To survive and be effective, a federation must not only recognize and give expression to regional diversity but also must achieve common agreement on core matters. No matter how much a federal system allows for the expression of regional differences through autonomous state or provincial governments, the federal solution is ultimately bound to disintegrate without some positive consensus among its component groups. And it is upon the structure and processes of the central institutions that the ability to generate such a consensus depends. The form of these central institutions, the processes by which the decisions of central government are reached, and the participation of the different regional, cultural or other minority groups in arriving at these decisions all contribute to the overarching sense of community. Indeed, issues relating to intrastate federalism, as identified by the Royal Commission in its report *Challenges and Choices* — namely, the capacity of national institutions to reflect and reconcile diverse cultural, linguistic, economic, social and regional interests[3] — have been prominent in virtually every other federation.

But if an important function of the central institutions in a federation is to reflect and reconcile diverse regional interests, how are these regional interests to be defined? Are the formal provincial or state boundaries to be taken as defining the regions? Or is some other geographical grouping to be used? Furthermore, if regional interests are to be reflected within the central institutions, should this be based on the representation of the formally constituted governments of those provinces or states, or on some other form of representation?

On the question of defining the regional communities to be represented, the Canadian Senate has been unique among federal legislative chambers in having representation based primarily on regional blocks other than simply the provinces or states. Indeed, for purposes of formal representation in the central institutions, other federations have almost invariably equated "region" with the provinces or states formally constituting the federation. Thus, the view which the Royal Commission heard at its hearings — "By a region, I mean a province"[4] — would be consistent with the general practice in other federations.

As to whether provincial or state interests should be reflected in central institutions through representatives of the governments of those units or through other forms of representation, federations elsewhere have displayed variety. The clearest example of incorporating state government representatives within central institutions is the German Bundesrat. This constitutionally prescribed organ of the central government consists of delegates appointed and controlled by the state governments.

Initially, the second chambers of the United States and of Switzerland were elected by the state legislatures and cantonal legislatures or councils. Direct election replaced this in the American Senate in 1913, and all members of the Swiss Council of States are now directly elected by the voters of the cantons. It is worth noting, however, that, in the United States, state legislatures continue, subject to certain constitutional provisions, to control central aspects of election to national offices (see above), and the cantonal governments in Switzerland still set the rules for the selection of members to the central second chamber.

In most of the newer federations in the Commonwealth, indirect election by state legislatures has been the predominant mode of selection for the central second chamber (see below in the section on second chambers). Furthermore, unlike India, where indirect election is accompanied by a provision for proportional representation, some federations such as Malaysia use indirect election, which in practice amounts to appointment by state governments.

But while the representatives for regional interests within central institutions are often selected by the governments or legislatures of the constituent states, this has not been the invariable arrangement. In three major contemporary federations — namely, the United States, Switzerland and Australia — state representatives in the federal second chamber are chosen not as representatives of the state governments but rather as representatives of the voters within each state by direct election.

Since it appears that most federations have given particular attention to reflecting varied regional interests within their central institutions, one might ask, as does Ivo Duchacek, is bicameralism and equal repre-

sentation of unequal states in a second chamber one of the defining yardsticks of a genuine federal system?[5] Given the great variety of federal themes in existing federations, Duchacek is correct in concluding that this is not a definitive prerequisite of a federal system. On the other hand, making the distinction, as does K.C.Wheare, between the definitive characteristics of a federal system and those characteristics required to enable a federal system to function effectively[6] shows that most central institutions have built a capacity to reflect and reconcile diverse cultural, linguistic, economic, social and regional interests. While these capacities often take the form of constitutionally required structures and processes, they may also depend upon convention. Where constitutionally assured, such provisions have left minority or regional interests with less sense of vulnerability, but this has been at the expense of flexibility and adaptability.

The prevalence of these strong elements in most federations suggests that interstate and intrastate elements are complements rather than alternatives. While they present alternative ways of assuring the fuller regional expression either locally or centrally, they also complement each other in the formation of a national consensus. Most federations recognize the need for strong elements of both. Interstate federalism provides regional groups or communities with the opportunity for preserving their distinctiveness and retaining autonomous political authority. Intrastate federalism is necessary to accommodate and reconcile the variety of regional viewpoints in support of the central institutions. The variation among federations depends not so much on whether they have incorporated elements of intrastate federalism but on the forms those elements have taken.

Fundamental Factors in Intrastate Federalism

The Form of the Executive

Every federal system has devoted considerable attention to the structure and processes of central institutions in order to reflect and reconcile regional interests in order to produce agreement on common policies. But federations vary radically in the character of such institutions. A fundamental and critical variable affecting the character of central institutions and hence the structure and processes of intrastate federalism is the form of the central executive. In this respect, federations may be classified according to two types of institutional form: pluralist, as in the United States and Switzerland, and parliamentary, as in Canada, Australia, many of the newer Commonwealth federations and the Federal Republic of Germany. This distinction has a fundamental bearing upon both intrastate and interstate federalism because of its impact on the accommodation of regional interests and on the character of intergovernmental relations.

The basic axiom embodied in the pluralist federations is the premise that political authority should be dispersed among multiple centres of powers — not simply between central and state institutions, but also among a variety of central institutions. Robert Dahl has argued that the fundamental pluralism of the American political system rests upon three basic postulates:

1) Because one center of power is set against another, power itself will be tamed, civilized, controlled, and limited to decent human purposes, while coercion, the most evil form of power, will be reduced to a minimum.
2) Because even minorities are provided with opportunities to veto solutions they strongly object to, the consent of all will be won in the long run.
3) Because constant negotiations among different centers of power are necessary in order to make decisions, citizens and leaders will perfect the precious art of dealing peacefully with their conflicts, and not merely to the benefit of one partisan but to the mutual benefit of all the parties to the conflict.[7]

Thus, in order to tame power, to secure the consent of all and to settle conflicts peacefully, the federal distribution of authority between central and state governments is accompanied in the United States by the "separation of powers" within each order of government. The authoritative decision making within the central institutions is dispersed among the president, the House of Representatives, the Senate and the Supreme Court. In this presidential-congressional system, the various institutions have been assigned powers that check and balance each other; central decision making requires compromises that take into account a variety of regional and minority views.

The Swiss federal system is based on the same fundamental principle of dispersed but interacting multiple centres of power, although differing in many respects of detail from the American forerunner. In addition to the division of authority between the central and cantonal legislatures, the two central legislative chambers have independent but equal authority. The members of the Federal Council, while elected by the two houses in joint session, are excluded from membership in either chamber and hold office for a fixed term. The citizenry itself has an important role through the procedures of initiative and referendum. While the embodiment of the "separation of powers" and the fixed term of office for the executive follows the American example, the Swiss arrangement differs in making the executive a collegial one, consisting of a council of seven members with the chairmanship normally rotating annually. This arrangement was adopted deliberately in 1848 to avoid the American concentration of authority in a single man. It also has the advantage that it enables a representation of different regional and minority groups in the executive council. For example, the Federal Council is limited to no

more than one representative from each canton, and the Roman Catholic and French minorities have always been represented in it. But the fixed term and non-membership in the legislative houses contrast with the parliamentary cabinets found in most Commonwealth federations. As in the United States, there is a diffusion of authority among the central institutions, thus creating plural centres of political power interacting to balance and check each other in order to facilitate the resolution of conflicts and the emergence of a widely accepted consensus.

In contrast to the United States and Switzerland, the parliamentary federations have attempted to combine the British parliamentary system with the federal form of government. Canada was the first to do so, but Australia, the Federal Republic of Germany and most of the new federations in the Commonwealth — India, Pakistan until 1958, Malaya (subsequently Malaysia) and Nigeria until 1966 — followed this pattern. This form is derived from its British unitary origins where sovereignty is concentrated not only in the central institutions, but also in a parliamentary cabinet within the central government. This combination of federalism with the Westminster model represents a radical departure from the theory and practice of American and Swiss federalism. It replaces the dispersal of authoritative decision making among multiple central institutions by concentrating authority within a central parliamentary cabinet that has the support of the legislature.

These contrasting forms of executive have had a fundamental impact upon the character of intrastate federalism. On the whole, the pluralist federations have been relatively successful in resolving conflicts within the central institutions. On those occasions where conflicts have become serious, the checks within these systems create a delay during which discussion and formulation of a consensus may take place. The one significant exception was during the period leading up to the Civil War in the United States in the nineteenth century. Generally, however, the need to capture a single presidential post induces political parties to seek compromises in order to win maximum electoral support among a wide range of political demands. The separation of powers and the multiple checks and balances have usually been an inducement to seek compromise in central deliberations.

The Swiss federal system, created in 1848 after the previous confederacy had disintegrated into civil war, has become renowned for the manner in which it has reconciled unity with religious and linguistic diversity. The Swiss collegial form of executive combines the stability of the fixed term executive and the checks and balances found within the American system with the further benefits of explicit representation of different regional and minority groups in the collective executive. Added to this is the arrangement whereby any legislation challenged by a specified number of citizens must be put to a referendum for validation. This apparatus provides an inducement for Swiss politicians to form

broad multi-party governments encompassing not just a bare majority but the support of virtually all major parties and interest groups as well. Failure to do so may encourage potential challenges to legislation through the referendum.

But while the pluralist federations have attempted to incorporate strong inducements for the reconciling of regional and minority interests and conflicts within the central institutions, this has not been without a price. In both federations, the diffusion of authority among the central institutions has often made decision making protracted and urgent action difficult. Where fundamental problems have remained unresolved for long periods, the lack of resolution has become a source of added stress. Nevertheless, the relative longevity of the American and Swiss federal systems — two of the oldest constitutional systems in operation anywhere in the world today — attests to the contribution of the elements of intrastate federalism in their structure to their effectiveness.

The parliamentary federations, in contrast, by concentrating political power in cabinets possessing majority legislative support, have been able to undertake more rapid and coherent decision making and action. But this arrangement has exacted its own price. Within the central institutions, it has in effect placed complete political control over those functions assigned to the central government in a majority unrestrained by institutional checks. This is exemplified by the typical weakness of second chambers in most parliamentary federal systems in contrast to the relative strength of the American Senate or the Swiss Council of States and by the dominance of cabinet initiative in legislation and of party discipline within the federal legislatures. The lack of institutional checks upon the majority in parliamentary federations has usually put the responsibility for taking minority views into account and for reconciling regional interests and cleavages directly upon the internal organization and processes of the national political parties themselves. Consequently, in central deliberations, sectional and minority interests have usually been more vulnerable to a permanent majority with any solidarity. The record of parliamentary federations elsewhere suggests that their cohesion and stability has been closely related to the degree to which the national parties obtaining parliamentary majorities have consciously accommodated the interests of major sectional or regional interests. Where the political parties have failed in this task, and particularly where a fragmented multi-party system or a primarily regional differentiation of national parties has developed, parliamentary federations have been prone to instability, the clearest examples being Pakistan before 1958 and Nigeria before 1966.

The form of executive established within a federal system has had a fundamental impact upon intergovernmental relations. The American and Swiss forms of executive, incorporating within both levels of government the separation of powers, have given administrative agencies

within each level of government greater freedom to negotiate with the agencies at another level of government in working out specifically functional schemes. Furthermore, the weaker party discipline associated with the separated and fixed executives has given administrators the opportunity to lobby and play a political role themselves; they may seek support for their programs not only from their own legislators but from legislators in the other level of government. Thus the interactions between the administrators and the legislators within the two levels of government, representing multiple interdependent and interacting authorities with overlapping functions, have led Morton Grodzins to characterize federalism in the United States by the image of a "marble cake,"[8] as contrasted with a "layer cake," an image equally applicable to Swiss intergovernmental relations.

In the parliamentary federations, although there has been considerable intergovernmental interaction, the context has been quite different. In the parliamentary federations, the central role of the cabinet within each level of government has made the cabinets the dominant focus for intergovernmental relations. Furthermore, cabinets can usually commit their legislatures, unlike governments in countries where there is a separation of powers. This has resulted in what has come to be known as "executive federalism" which seems often to operate in a manner not unlike international diplomacy. As a result, with the increased interaction among governments, negotiations between governments are left less to technicians; ministers and politicians play a more prominent role. There is a tendency for individual projects for functional cooperation to be subsumed under more general arrangements for coordination. Some governments place intergovernmental issues under the control of staff agencies exclusively for that purpose. Summit conferences of government leaders, such as the Premiers Conferences in Australia, First Ministers Conferences in Canada, and similar conferences of government leaders in other parliamentary federations become the primary instrument for resolution of intergovernmental problems. They frequently serve as a place for public confrontation as much as a place for resolving differences. As a result, intergovernmental relations in the parliamentary federations generally take on a much more strongly "layer cake" pattern. This contrast indicates that the character of intrastate federalism has an important impact upon interstate federalism and that the two cannot be isolated from each other.

An important issue in any parliamentary federation, therefore, is how to reconcile the Westminster model of cabinet government with the requirements for elements of intrastate federalism. At one time, it may have been possible to conceive of adapting a federal system through adjustments to the elements of interstate federalism alone. But the trend to greater rather than less intergovernmental interdependence in con-

temporary federations, the difficulty of making adjustments to the allocation of jurisdiction which will prove adequate, and the dependence therefore of central governments on state or provincial cooperation in order to achieve national goals indicate that effective harmonization of governments within a federation is essential. This may entail introducing a larger element of intrastate federalism within the central institutions. But any effort to do so within a parliamentary federation must focus on the role and processes of the executive itself. Because of the dominant role of the cabinet in the Westminster model, only limited gains are likely to be achieved by adjustments to other central institutions such as the second chamber.

Legislative versus Administrative Federalism

The character of intrastate federalism appropriate to a federation depends on whether the distribution of functions between the two orders of government is legislative or administrative. Legislative federalism means that the legislative and administrative jurisdictions between governments largely coincide. Generally, those accustomed to the British parliamentary system may assume a correspondence in the scope of legislative and administrative responsibility based on a government's ability to implement their legislative decisions. But an alternative arrangement is possible whereby a substantial range of functions over which one level of government (usually the central government) has legislative authority while the other level of government (usually the states) has administrative responsibility. This is known as administrative federalism.

Pure examples of either legislative or administrative federalism are rare. Where legislative and administrative jurisdictions coincide, there are often a few exceptions; states with constitutionally assigned administrative jurisdiction for central legislation always have some fields where the central and state governments each have administrative responsibility for their own legislation. Nevertheless, most federations tend to fall into one or the other classification.

The United States, Canada and Australia provide classic examples of legislative federalism. In the United States, not only is each order of government responsible for the administration of its own laws, but each has its own court system. It is true, however, that in practice, partly through joint financing arrangements, there is a good deal of delegating and sharing of administrative functions.[9] In Canada, the assignment of legislative and administrative responsibilities largely coincides, although notable exceptions are criminal law and the organization of the court system. Australia, too, adopts the pattern of legislative federalism, although the much more extensive range of concurrent jurisdiction

distinguishes it from the Canadian pattern. The central government has an extensive role in areas where the subsidiary state legislation and administration may continue to operate.

By contrast, the Swiss and West German federations rely extensively upon cantonal or state administrators for applying and enforcing central laws. In Switzerland, the cantons, in addition to having primary responsibility in certain areas such as maintenance of law and order, health and sanitation, public works and education, also execute federal laws covering organization of the army, the system of weights and measures, courts, and the enforcement of the criminal code.[10] The Federal Republic of Germany goes even further, for the states, in addition to possessing authority to execute their own legislation, are also responsible for the general execution of federal legislation except where otherwise indicated in the Basic Law.

The newer Commonwealth federations established since 1945, particularly those in Asia, have also included significant elements of administrative federalism. For greater flexibility, provisions permit voluntary delegation of executive authority from one government to another. In addition, their constitutions give responsibility for subjects within the concurrent legislative list (which is usually quite extensive) to the states. Thus, for instance, the Indian central government supervises its legislation on social action programs largely as a "staff" organization, coordinating their implementation by the states through conferences, rather than by directly administering them itself.

The differences between legislative and administrative federalism are reflected in higher proportions of public expenditure and administrative staffing distributed to states rather than central governments. This is especially true for those federations where administrative federalism has been adopted.[11] Thus, while most examples of administrative federalism display a relatively centralized concentration of legislative jurisdiction, the extensive sharing of administrative and expenditure responsibilities with their states ensures a sensitivity to regional interests and maintains awareness of the need to accommodate those interests.

The distinction between legislative and administrative federalism signifies different courses for intrastate federalism among federations. In administrative federalism, coordination between levels of government for legislating and administering the same laws puts a premium on state representation within the central institutions. This provides the rationale for the West German Bundesrat, a federal second chamber composed of members of the state government. The absolute veto over federal legislation held by this second chamber is confined to central legislation containing provisions to be administered by the states. This ensures consultation and agreement among the states administering these central laws. In practice, legislation of this type has represented close to half

of the total federal legislation in West Germany. The Bundesrat system does not give the states an opportunity to block laws exclusively within central legislative and administrative jurisdiction, but only a weak suspensory veto. The primary function of the Bundesrat system is to give states assurance that they are obligated to administer only that federal legislation to which they have given their consent. Any effort to transplant such an institution must therefore take account of the specific milieu of administrative federalism for which the Bundesrat was designed.

Switzerland achieves the same effect but in a different way. It uses the unusual provision of permitting concurrent membership in a cantonal legislature or executive and one of the central legislative houses. Thus, although dual membership is not required, and members of the federal second chamber are directly elected by the electorate, the fact that nearly 40 percent of the members of the Council of States happen to be members of a cantonal legislature or executive adds weight to their views in the cantonal chamber, while giving an important cantonal component to the central authority.[12]

The newer Commonwealth federations, by emphasizing indirect election to their second chambers, also provide a governmental element to their intrastate federalism. In Malaysia, this is reinforced by permitting, as in Switzerland, dual membership in a state legislature and federal second chamber.

On the other hand, regional representation within the central authority is not provided in the three federations where legislative federalism predominates — namely, the United States, Canada and Australia. One reason for recent demands in Canada for greater participation by the provinces in central activities that affect them is the convergence of trends in the exercise of legislative and administrative federalism.

The Central Executive

Any effort to incorporate elements of intrastate federalism within a federation depends on the role and composition of the central executive. The founding fathers of the older federations, in attempting to incorporate intrastate federalism through bicameralism, believed that legislatures had the primary role in rule making, with decisions implemented by the executive branch and interpreted by the judiciary. However, the rule-making monopoly of legislatures has now been replaced almost everywhere by the executive. Efforts to achieve intrastate federalism without taking this into account are apt to have only peripheral impact.

The effort to strengthen the capacity of central institutions to reflect and reconcile diverse cultural, linguistic, economic, social and regional interests may take two forms. One is to establish checks upon the

operation of the central executive to make it responsive to regional interests. The other is to require a composition that adequately reflects the variety of interests.

Pluralist federations such as the United States and Switzerland have a variety of checks and balances that require central acknowledgment of diverse interests and compromises in the search for consensus.

In most parliamentary federations, however, such institutional checks upon the cabinet are lacking. A cabinet with majority support in the lower chamber retains control. There are two exceptions to this general pattern. The Australian Senate has the power to block supply and, in certain circumstances, to force an election through double dissolution. Such powers have occasionally been exercised, most notably during the 1974–75 constitutional crises. This illustrates the tension between the requirements of intrastate federalism and responsible cabinet government when federal and parliamentary institutions are combined. Nor was this unforeseen by the founders of the Australian federation. Concerns were expressed at the 1891 and 1897 Australian Constitution Conventions that either responsible government would kill federation or federation would kill responsible government.[13] The constitutional crises of 1974–75 appear to have focussed Australian attention on the latter concern. In an effort to solve the perceived problems of those crises, thought was given to fixing the term of Parliament in order to reduce the vulnerability of the executive to defeats in the House of Representatives or the Senate.[14] By contrast, the former concern has predominated in Canada and most other Commonwealth parliamentary federations.

The one other parliamentary federation in which the requirements of intrastate federalism have led to institutional checks upon the cabinet is, of course, the Federal Republic of Germany. In the interests of effective administrative federalism, the Bundesrat may exercise an absolute veto over legislation which would fall under the administrative responsibility of the state. For the cabinet to pass such legislation, majority support in the Bundestag is not enough.

Usually, however, within parliamentary federations, the British traditions of responsible cabinet government have been given priority over the requirements of intrastate federalism. This is exemplified in the weak suspensive veto assigned to their second chambers which generally play a useful but limited role. They may express state and minority views, but they seldom have sufficient political influence to impede seriously a cabinet based in the popular chamber.

Most parliamentary federations are under strong pressure to include adequate and balanced representation of regional and minority interests in the membership of the central cabinet itself. While such pressures are powerful, the regional composition of cabinets is invariably left to convention in order to preserve cabinet responsibility to the legislature.

Nowhere among the parliamentary federations are there constitutional stipulations about regional representation within a parliamentary cabinet. Nevertheless, in practice, strong conventions have usually evolved. The Australian central cabinet makes every effort to include state and local representatives.[15] Similarly, each of the newer multicultural federations in the Commonwealth attempts to include all the major states or groups of states in balanced representation.[16] The issue, however, is not merely one of cabinet composition but, in the face of perceived executive dominance of the legislature, one of ensuring active responsiveness and sensitivity to regional interests. Because of the British tradition of cabinet confidentiality, there is little literature available on the internal organization and processes adopted by central cabinets. But these examples show that pressures for greater central cabinet responsiveness to regional and other interests are not unique to Canada.[17]

Nor are these considerations limited to parliamentary federations. Membership in the Swiss collegial Federal Council is constitutionally limited to no more than one member from any canton. In addition, custom has prescribed that Berne and Zurich. the two most populous cantons, and Vaud, the largest French-speaking canton, should always be represented. Moreover, custom dictates that two or sometimes three non-Germans should be included in the Council and that there should be a balance of Protestants and Roman Catholics.[18] Furthermore, given the relatively stable multi-party situation, the composition of the Federal Council has been virtually fixed since 1959 to represent the major political parties in the ratio of 2:2:2:1.

In addition to the composition of the central working executive itself, the pressure for intrastate federalism has been reflected in most federations in the selection of the head of state, in pressures for representativeness in the composition of the central bureaucracy and in the appointment of members to central boards and agencies.

Although the post of head of state in parliamentary federations is largely a nominal one, nevertheless, in most federations, particularly multicultural ones, some symbolic importance has been attached to give focus to the federal union. Consequently, where a nominal president has replaced a governor general, as for example in India and briefly Pakistan and Nigeria, a process of indirect election has been adopted with intent to ensure some regional balance in the electoral process. Furthermore, the convention that the post of head of state should be rotated among representatives of different regional, ethnic or religious groups has been the norm.[19] The same effect is achieved within the Swiss collegial executive by the requirement that the post of President should rotate annually among the members of the Federal Council. It would appear, therefore, that most multicultural federations have felt the need to attract the loyalty of minorities by making the senior ceremonial post

open to members of each of the major regional or cultural groups within the federation.

The move to include regional representation has coincided with the expanding general role of governments in contemporary society.[20] Government and administrative services are more likely to be sympathetic and responsive to the needs of minorities if the central public service also has minority representation within its ranks. Reducing tensions between linguistic or cultural groups has a greater chance for success when minorities have opportunities to participate in the public services as full partners and when their sense of commitment to the federal union is encouraged in this way.

Desirable as this may be, two difficulties remain. First, there is conflict between the principle of regional representation and the principle that appointment and advancement should be based on merit. The second is the complexity in internal communications which arises when a single public service is composed of different linguistic groups.

Experience in multicultural federations elsewhere indicates that, although the precise policies adopted have varied with the particular circumstances of each federation, there has been a common recognition that federal cohesion requires careful attention to both administrative efficiency and regional representativeness.[21]

Many of the same considerations apply to the issue of regional representation in other central institutions such as Crown corporations and regulatory agencies. The validity of provincial government claims for a voice in the selection of the members of such bodies is perhaps limited to those cases where they directly affect provincial jurisdiction. But even where that is not the case, there is often a demand for appointment procedures that ensure the sensitivity and responsiveness of central boards and agencies to regional interests, such as ratification by the second chamber.

Central Representation and Electoral Systems

The effective and harmonious operation of any federal system depends on the belief that the central institutions represent the major groups. The operation of the electoral system and the internal processes of the popularly elected central legislative chamber are contingent upon this belief. This is all the more so in parliamentary federations where control of the legislature has been the key to central executive power.

While it is common for the first chambers in the central legislature of most federations to be directly elected, with seat distribution based upon population, there is considerable variation in the form of election. The single-member plurality system employed for the Canadian House of Commons is also used in many of the newer parliamentary federations

and for the American House of Representatives. The allocation of seats is sensitive to shifts in voter preferences, but tends to exaggerate majorities, thereby reducing the likelihood of minority governments. As in Canada during the past decade, this sytem over-represents intraregional majorities and under-represents intraregional minorities. This results in a discrepancy between legislature standings and popular vote.

To remedy this discrepancy in the central first chamber, three federations have adopted different electoral systems. Australia has adopted for its House of Representatives the system of preferential voting within single-member constituencies as a means of providing substantial parliamentary majorities while giving expression to the alternative preferences of supporters of minority parties and independent candidates. In this system, if no candidate in a given constituency receives an absolute majority of votes cast, the second preferences of the voters for the candidates who have received the least number of votes are distributed until one candidate has an absolute majority. The effects of this voting system are discussed in Chapter 6.

In Switzerland, a system of proportional representation was introduced in 1919 for election to the National Council. The method of proportional representation adopted was the flexible list system with party lists compiled by canton. This sytem tends to reflect fully intracantonal minorities. At the same time, its relative insensitivity to minor shifts in voter preferences has perpetuated a multi-party system, which has required a virtually permanent multi-party coalition within the fixed executive.[22]

The Federal Republic of Germany adopted a dual system. It wished to avoid the multi-party situation inherent in a pure system of proportional representation, as in the Weimar Republic with its attendant instability, as well as the representational distortions of a system based solely on single-member constituencies. Two categories of seats were designated, with 60 percent, (later modified to 50 percent) filled by direct election from single-member constituencies, and the remaining 40 percent (later raised to 50 percent) selected by proportional representation from party lists. Each voter casts two votes, one for each system.[23] In addition, to discourage splinter parties, political parties must poll not less than 5 percent of the national vote or win at least three seats by direct election in constituencies to obtain representation. In practice, these arrangements, while retaining some of the mathematical representativeness of proportional representation, have generally resulted in the election of workable political majorities, substantial and not entirely fragmented oppositions and some secondary parties of significance.[24] Governmental stability has been further reinforced by the introduction of the device of the constructive vote of confidence which requires that the Bundestag may express its lack of confidence in the Chancellor only by simultaneously electing a successor.

The degree to which a popularly elected legislature may reflect and express regional interests in its deliberations depends not only on the method of election but also on its internal processes and the degree to which party discipline may inhibit the presentation of regional views. In federations such as the United States and Switzerland with their fixed executives, party discipline generally tends to be weak, and the inhibitions upon the expression of regional views are few.

In all the parliamentary federations, however, with the need for party discipline to ensure the continuance of cabinets in office and the increasing dominance of cabinets within parliaments, party discipline has imposed strong inhibitions upon the expression of regional interests. Confidential discussions within caucus present the major exception. Not surprisingly, this has often led to a search for ways to make MPs more independent of party discipline. Such concerns are frequently expressed and improved legislative committee systems are often advocated as a way of counteracting some of the dominance of the cabinet. In practice, however, the logic of the parliamentary cabinet system has meant that, in virtually every parliamentary federation, party discipline has enforced a conformity on representatives, thus stifling the presentation of differing regional views in the public deliberations of the popularly elected central legislatures.[25] Thus, while a reform of procedures within such chambers may contribute to an improvement in the expression of regional views, such reform in itself is unlikely to produce a fundamental change.

Second Chambers

Because control of the central legislature is a major element in the control of central power, a major and contentious issue in every federation is the organization of the central legislature not only to represent the electoral majority but also to reflect and reconcile the diverse linguistic, cultural, economic, social and regional interests. The controversy centres on the regional composition in the central legislature to account for diversity in regional interests as well as disparities in population, area and wealth among the constituent states. Smaller regions, fearful that representation based solely on population would muffle their voices, have pressed for equality of state representation. or at least some weighting favouring the smaller states. The larger regional units, on the other hand, have insisted upon their fair share of representation, citing not only the democratic principle of representation by population, but also the financial support demanded of them to assist the smaller and poorer states.

A second contentious issue is the method of selecting members to the central legislature. State legislatures want a hand in selection to ensure a regional representation of interests with safeguards against expansion of central activities at the expense of the state government. The counter-

vailing argument is that such an arrangement is "undemocratic" and would undermine the independence of the central legislature by subordinating it to the state legislatures.

The classic resolution to these issues was the Connecticut Compromise in the United States. The lengthy impasse at the Philadelphia Convention over the appropriate structure of the central legislature was resolved by proposing a bicameral solution. One chamber, the House of Representatives, was to be composed of directly elected representatives with representation according to population, and the other, the Senate, was to embody equal representation for each state with the senators elected by the state legislatures.[26]

To lessen conflict, most federations have followed this classic solution and have established bicameral central legislatures. The Swiss in 1848 and the Australians in 1901 created central second chambers, as did most of the post-1945 federations including Germany, India, Malaysia, the West Indies and Nigeria.[27] Significantly, two federations that previously experimented with unicameral central legislatures — namely, Malaya in 1957 and Nigeria in 1960 — subsequently added a senate. Despite variations in form to include equal or weighted state representation and indirect or direct election or appointment by state governments, the second chambers have generally been adopted.

The Canadian Senate with appointment of members by the central government is unique. The only example with any similarity was that in the short-lived West Indies Federation, where appointments to the central second chamber were made by the governor general; but since appointees were required to consult with the territorial governments rather than the central one, its character was very different. Given the prevailing need felt in federations elsewhere to employ a federal second chamber as a major element of intrastate federalism, it is hardly surprising that the issue of Senate reform should have had such persistence within Canada.[28]

The effectiveness of second chambers in ensuring a regional or minority interest role in making federal decisions depends on its relative power among the central institutions. Here, the distinction made above between pluralist and parliamentary federations is a crucial one. As a general pattern, pluralist federations such as the United States and Switzerland have established strong second chambers, with power and influence equal to that of their first chambers.[29]

In the parliamentary federations, however, it has proved difficult to reconcile the principle of cabinet responsibility to the popularly elected first chamber with that of an equally powerful second chamber. Consequently, in the Commonwealth federations, the second chambers have generally been weaker in constitutional authority, political influence and prestige. Their effectiveness in counterbalancing the majoritarian bias of the central institutions has therefore been relatively limited.

The popular chamber has inevitably had greater power because of its predominance in introducing legislation, controlling finances, and extending or withdrawing confidence in the cabinet. Usually in cases of deadlock, the first chamber, except in cases of constitutional amendment, has been given power to override the other, either simply by later repassage, as in Malaysia, the West Indies or Nigeria, or by outnumbering the members of the second chamber in a joint sitting, as in Australia and India.[30] All of the Commonwealth federations restrict the initiation of money bills to the popular chamber and, with the exception of Australia, second chambers have usually been restricted to an advisory role in the passage of money bills.

In all Commonwealth federations, members of the second chamber may sit in the cabinet and, in most of the newer federations, cabinet ministers may be questioned in the second chamber whether they are members of that chamber or not. Nevertheless, the cabinets have always been responsible only to the popularly elected house. More than any other factor, this feature of the British parliamentary tradition has placed these second chambers in a position of clearly subordinate influence and prestige. Thus, as instruments of intrastate federalism, these second chambers have served primarily as useful advisory bodies in which regional and minority views may be expressed but whose political influence seldom has impeded the popular chamber and the cabinet. Consequently, the main political responsibility for reconciling conflicting regional viewpoints has fallen elsewhere — upon regional representatives within the central cabinets and upon the internal organization and processes of the federal political parties.

This situation is determined by the belief widely held in Britain and the parliamentary federations of the Commonwealth that cabinet government must be responsible to one house only, and that house must be popularly elected. A notable exception was the former arrangement in Sweden whereby the two chambers of the legislature were equal in power, with the cabinet responsible to both, but this was replaced in 1971 by a less cumbersome unicameral legislature.[31]

Among the parliamentary federations in the Commonwealth, Australia has come the closest to establishing a second chamber with some real powers to check the first chamber and the cabinet. As the only directly elected central second chamber within a parliamentary federation, it possesses added political legitimacy and prestige. Furthermore, its ability to block supply and to force an election has given it a clout that other parliamentary second chambers have not. The constitutional crises of 1974–75 led some Australian critics to consider that the Senate might undermine responsible government. But other commentators such as Campbell Sharman have suggested that the Senate has provided a means to counter the executive dominance of the lower house and that, by

putting a premium on compromise, it has enhanced the government's responsiveness.[32]

The role and impact of a central second chamber within a federal system is derived not only from its constitutional powers but also from the method of selection for its members and the composition of the chamber. Appointment by the central government is an arrangement unique to Canada. Elsewhere, this has generally been considered inappropriate if the members of the second chamber are to be genuine representatives of regional interests. Nor have joint appointments by the central and provincial governments found favour as a general approach. Three federations, India, Nigeria and Malaysia, have made some provision for a number of additional members to be appointed to the second chamber by the central government in order to ensure the presence of eminent individuals or the representation of special minorities. In India, 12 of the 238 members of the Council of State are appointed by the central government to represent the fields of literature, science, art and social service. In Nigeria, a similar justification led to the provision in the 1960 constitution for four of the 52 senators to be appointed by the central government. In both federations, the actual appointments were consistent with the original intentions.

In Malaysia, centrally appointed senators represent a more significant proportion of the second chamber, constituting over 40 percent. Although the constitution expressly stipulates that those appointed should be persons who have "rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social service, or are representatives of social minorities or are capable of representing the interests of aborigines," party considerations tend to prevail, as in Canada. This in effect undermines the quality of perceived representativeness.[33]

As an alternative method of selection, appointment by the provincial governments became a popular proposal in Canada during the latter part of the 1970s.[34] Typically, this direction of reform was justified as one which might create a more genuine element of intrastate federalism within central institutions and improve federal-provincial relations.[35] The attractiveness of this approach to Canadians in the late 1970s was reinforced when the Australian constitutional crises of 1974–75 focussed attention upon the tensions likely to be created in a parliamentary system by a directly elected Senate.

The prototype for the Canadian proposals for a central second chamber appointed by the provinces is the Bundesrat in the Federal Republic of Germany. Although the executive in that parliamentary federation is responsible to the popularly elected house, the Bundestag, a number of features have made the Bundesrat a more influential and significant body than the second chambers in most parliamentary federations. Since its

membership is composed of the heads of government and some cabinet ministers from the states, who attend as instructed delegates appointed and controlled by the state governments, the Bundesrat has gained stature because its members possess quasi-diplomatic responsibilities on behalf of the state cabinets. Some special constitutional powers have also strengthened its position. All bills of the central government must be submitted first to the Bundesrat for a statement of its position before being presented to the popularly elected chamber. The result has been extensive federal-state negotiations over much of the central government's proposed legislation before formal presentation in the popularly elected chamber. Furthermore, the Bundesrat, in addition to possessing a suspensive veto over ordinary legislation, has an absolute veto over legislation whose provisions affect state responsibilities. Virtually half the legislation enacted by the federal Parliament falls in this category. The effect of these arrangements taken together makes the Bundesrat a genuinely influential component among the central institutions.

In its operation, the Bundesrat plays a major role in protecting state autonomy and interests from central intrusions.[36] Furthermore, by serving as a permanent meeting ground for the federal and state governments and their bureaucracies, it has become the major institution for intergovernmental negotiation and cooperation within the West German federation. Another important impact of the Bundesrat is its influence upon the operation and strategies of the political parties. Because the political parties can obtain representation in the Bundesrat only if they hold power in the state governments, state elections amount to indirect elections to the Bundesrat. This has induced close working relationships between the federal and state parties, thus encouraging the integration of central and regional interests.

Many of the unique characteristics of the Bundesrat were devised to fit the administrative federalism that permeates the West German federal system (see above in the section on legislative versus administrative federalism). State government involvement in central legislation requires this strong element of intrastate federalism represented by the Bundesrat. Canadian critics of proposals for a similar federal second chamber are quite right to point out the sharply different context in Canada, where legislative federalism predominates. Nevertheless, fears abound that such a provincialist form of intrastate federalism might create a "house of obstruction" and prevent effective and cohesive central action. Critics holding this view overlook the integrative dynamics in intergovernmental relations in the West German approach, where the federal second chamber represents state governments but does not require unanimity in its decisions.[37]

In Canada in 1980 a Liberal government was returned to power with a commitment to arrest the erosion of central power and to reinforce the central government as a focus for loyalty. Its emphasis was upon the

Charter of Rights, but it also proposed more centralist forms of intrastate federalism expressed through a directly elected Senate.[38] By this time, concerns aroused by the Australian constitutional crises of 1974–75 about the difficulties of combining a relatively strong, directly elected Senate with the cabinet system had largely receded.

The notion of a directly elected Senate has two particular attractions. First, it suggests a way of specifically representing regional interests within the central institutions while bypassing the provincial governments and yet retaining the overwhelming support of the electorate. Secondly, given the unlikelihood of obtaining sufficient support to introduce an element of proportional representation in the House of Commons, a directly elected Senate employing the method of proportional representation as in Australia would provide an alternative way of correcting electoral distortions in Ottawa.

While direct election was not the original method employed in the U.S. Senate and the Swiss Council of States, it is now the prevailing pattern in both federations. But since neither are parliamentary federations, their relevance as models for Canada is extremely limited. Under the Swiss constitution, however, authority to determine the method for selection of the members of the Council of States remains with the cantonal governments. Although many cantons originally chose indirect election, over time they came to choose direct election, until that method came to be employed by all cantons. A similar provision adopted in Canada would give recognition to the role of provincial governments in the direct election of provincial senators.

In Australia, members of the Senate are elected from state-wide constituencies on a basis of proportional representation using the single transferable vote for six-year terms, half being elected every three years. The vastness of the state-wide electoral divisions and the single transferable vote system (which is very little different from a list system of proportional representation)[39] have made candidates dependent upon the party organizations for successful election. As a result, senators have become primarily representatives of their parties rather than of their states. Although the polarization of political loyalties has blunted the character of the Senate as a chamber reflecting regional interests, senators continue to act independently; on several occasions senators have crossed the floor to vote against the government on major issues. Furthermore, the Senate's propensity to generate majorities hostile to the central government has put a premium on compromise which has induced a corresponding responsiveness from the cabinet in order to prolong its term of office.[40] Thus, the Australian Senate has had a signficant impact on central deliberations.

The other parliamentary federations in the Commonwealth, concerned about the difficulty of reconciling an elected second chamber with a parliamentary cabinet, have generally chosen instead the method

of indirect election by state legislatures. Variations, of course, abound. In India, election to the Council of States is by proportional representation in the state assembly, thus ensuring minority representation from each state.

Among the proposals for Canadian Senate reform, Bill C-60 in 1978 bore some similarity to the Indian arrangement in that half the senators from each province were to be chosen in this way. But the proposal was complicated by the requirement that the other half of the senators would be elected by the House of Commons also using proportional representation, an arrangement without precedent elsewhere. The consequent complexity of this proposal brought into question its practicality as an effective instrument of intrastate federalism.

In Malaysia, unlike in India, the use of the simple majority ballot system for the election of senators by the state assemblies means that only nominees of the party governing in a state may be elected, thus in practice making the method little different from appointment by the state governments.

The base units in all contemporary federations are established states, provinces or cantons. Equality of state or provincial representation within the federal second chambers is usual but not universal. Equal representation prevails in the second chambers of the United States, Australia, Malaysia, Nigeria and the West Indies. In Switzerland each full canton has two representatives and each half canton has one. By way of comparison, state representation in the West German Bundesrat and the Indian Council of States is based on a formula weighted in favour of the smaller units. The West German formula assigns each state at least three seats but gives states with more than two million inhabitants four seats and those with more than six million five seats. In India, the formula is more closely related to population, with seats in the Council of State based on one seat for each of the first five million people, and then one seat for every additional two million. One might think that equality of representation would prevail where the disparity in the relative sizes of the constituent units is not great, and that weighted representation would be used where disparities are extreme. However, differences in state populations are greater in the United States and Switzerland than in West Germany or India. The choice between equal or weighted representation therefore seems to depend more on pragmatic compromise than on theoretical considerations.[41]

This issue is complicated in Canada by the fact that the francophone minority is concentrated in one of the largest provinces. Equality of provincial representation in the Senate or a heavy weighting for the smaller provinces would aggravate the minority position of francophones within the central institutions. But if Quebec's representation were reinforced in the Senate, then representation of Ontario, the largest province, would be distorted, while the voice of the smaller provinces

might become too weak. In the circumstances, a pragmatic solution of weighted representation which favours the smaller provinces but does not under-represent the western provinces or unduly reduce the representation of Quebec's francophone population would appear to be necessary. A number of variations on this theme have been advanced in recent years.[42] The requirement of a double majority on linguistic matters, as included in some recent Canadian proposals, represents a further attempt to deal with this problem. But, while such an arrangement would provide some protection against any reduction of linguistic safeguards, it would increase the difficulty of improving the situation for a linguistic minority. Such arrangements have no precedent in other federations.

In sum, most federal second chambers take on major roles for attempting to implement intrastate federalism, but the primacy of the lower house and the dominance of the cabinet in most parliamentary federations limits their usefulness. Only where the federal second chamber in a parliamentary federation has been given significant rather than nominal powers, as in West Germany or Australia, has the second chamber served as a major instrument of intrastate federalism.

The Federal Umpire

Every federal system composed of coordinate central and state governments, in which neither order of government is subordinate to the other, has found it necessary to establish an umpire to rule upon disputes relative to respective governmental powers and to interpret the constitutions. The body performing this function represents not so much a central institution, in which intrastate federalism might be expressed, as a federal institution ruling upon disputes arising from the operation of interstate federalism and whose impartiality and independence in relation to the two orders of government is important. In most federations, this role of the federal umpire has been played by a supreme court or a specialized constitutional court.

In Switzerland, the umpire deciding on the validity of federal legislation is the electorate acting through a referendum. While the Federal Tribunal has the ultimate authority to rule on the constitutional validity of cantonal legislation, it does not have the right to declare federal laws unconstitutional.[43] In Switzerland, since 1874 all federal laws and universally binding *arrêtés* must be submitted to the electorate following a petition supported by a specified number of Swiss citizens or a demand by eight cantons.[44] In the first 87 years after its adoption, the general legislative referendum was called into use 67 times and in only 25 of those cases did the voters give their approval.[45] The legislative referendum has therefore had a significant impact upon central legislation in Switzerland. One result has been the marked caution and conservatism

of Swiss governments in introducing controversial legislation. Its use has encouraged widespread prior consultation with economic and cantonal interest groups before legislation is introduced in the Federal Assembly. The central executive has therefore adopted a tradition of joining all major parties in a coalition to ensure maximum political support for government policies and legislation, thereby reducing the likelihood of a referendum challenge. In this respect, the legislative referendum has established a dynamic in Swiss politics for maximizing intrastate federalism within the central institutions.

All the other federations have relied on the courts, with a supreme court or constitutional court as the ultimate authority, to rule on the constitutionality of both state and central legislation. Given their umpiring role, it has usually been considered important that the supreme or constitutional court should be, and appear to be, impartial and independent of both orders of government. Thus, in the United States, the justices of the Supreme Court are appointed by the president but the appointments have to be ratified by the Senate. In the parliamentary federations in the Commonwealth, however, confidence in the British traditions of the independence of the bar and judiciary has meant that the appointment and dismissal of members of the supreme courts has usually been left in the hands of the central cabinets and parliaments. Nevertheless, in those parliamentary federations established after 1945 additional requirements were added, for example, to require the central cabinet to consult certain judicial bodies and, in some cases, regional governments.[46] With the exception of some federations like Malaysia, where the chief justices of the state high courts are included as ex-officio members of the supreme court, it is not usual for constitutions to specify a regional composition for supreme courts, but in practice attention to regional balance has usually occurred.

The Federal Republic of Germany followed a somewhat different pattern from the United States and the Commonwealth parliamentary federations. Rather than having the supreme court act as umpire, it has established a Constitutional Court whose sole function is the interpretation of the Basic Law. Since its judges are selected one-half by the Bundestag and one-half by the Bundesrat, both orders of government play an equal role in the selection of its members.

Conclusions

Most federations have paid much attention to facilitating the representation and accommodation of distinctive regional interests within the central institutions. Indeed, interstate federalism and intrastate federalism have been seen not so much as alternatives but rather as complementary elements necessary in any effective federation. As such, intrastate federalism has sometimes — but by no means always — involved

the representation of regional interests through the involvement of state governments on their representatives.

In the case of parliamentary federations, effective intrastate federalism has generally proved more difficult to achieve. Because of the dominant role of the cabinet among central institutions in such systems, efforts to achieve intrastate federalism by such means as second chambers designed specifically to represent regional interests, while proving useful, have generally been limited in their impact. The special powers of the West German Bundesrat and the Australian Senate, however, have given them a somewhat more effective role than the other examples. Effective intrastate federalism in the parliamentary federations appears to depend upon the extent to which the cabinet, as the dominant body within central institutions, itself embodies intrastate federalism in its composition and organization and in its political and administrative roles.

The Executive of the Government in Canada

The contemporary debate in Canada about intrastate federalism has had little to say about the executive elements of government. The focus has been almost entirely on the House of Commons, including the electoral system, the second chamber of Parliament and, to a lesser degree, the Supreme Court of Canada. Some of the proposed intrastate reforms would have implications for the executive function, for example, the proposal that government appointments to certain federal regulatory agencies be subject to ratification by a new kind of second chamber. However, the general thrust of intrastate analysis has ignored the executive organization of the federal government, or at best assumed that the indirect impact of changes in the electoral system for the House of Commons or the Senate would be a more regionally representative cabinet.

The Canadian system of government is dominated by the executive. Hence, if Ottawa is unresponsive to regional interests and concerns, the cause of the unresponsiveness is likely to be related in large part to the structure and operations of the executive itself. Therefore, any remedies not directly involving the executive are not likely to be successful. T.A. Hockin writes of "the tradition of a collective central energizing executive as the key engine of the state" at both the federal and provincial levels as the crucial element of the Canadian experience of government.[1] In this tradition, the executive almost monopolizes the governing function. The executive carries out the terms of legislation, and virtually all bills of a public nature which do get enacted into law are put before Parliament by the executive in a developed form. Canadians are subject not only to laws enacted by Parliament but also to a host of statutory instruments formulated by the executive. Departments and

regulatory agencies perform a large number of adjudication functions. The executive has unshared control over the external relations of governments whether those involve foreign nations or other domestic jurisdictions. Although the complex process leading up to the Constitution Act of 1982 involved a number of other actors, the processes of constitutional review and reform were largely conducted through executive federalism. Further, the executive itself has the unshared power to determine its own structures and procedures. This power is given too little attention by students of Canadian constitutional matters; in all but the most formalistic sense, the reports of the Royal Commission on Government Organization (under Chairman John Glassco) and the Royal Commission on Financial Management and Accountability (under Chairman Allen Lambert) were constitutional documents, and such recommendations of these commissions as were implemented were constitutional changes.[2] When historians of the future come to write about the evolution of the structures and processes of Canadian government in the late twentieth century, they will no doubt give prominence to the role of Prime Minister Pierre Trudeau in bringing about the Constitution Act and developing what Stefan Dupré calls the "institutionalized cabinet."

The rationalized processes of decision making put into place under the leadership of prime ministers Pearson and Trudeau, including the important initiatives during the brief interlude of Conservative government under Joe Clark, had considerable consequences for the responsiveness of the central government to regional interests and values. On the surface, an administrative revolution was effected.[3] Yet it is at least possible, as is often the case with revolutions, that more elements of the existing order have persisted than casual observations would indicate, and are partly masked by the continuing rapid transition. A very radical experiment directed toward enhancing "federal visibility" in the regions was announced early in 1982 with the dismantling of the Department of Regional Economic Expansion, the establishment of the new Department of Regional Industrial Expansion, and the creation of a system of regional offices in each province under the Ministry of State for Economic and Regional Development (MSERD). However, on June 30, 1984, Prime Minister John Turner cancelled MSERD as part of his general plan to reduce the number of central agencies and to strengthen the role of line departments.

The Federal Cabinet: Representational Composition

Along with the two chambers of the Dominion Parliament, the cabinet emerged at Confederation as a major national institution in Canada's system of representation. W.L. Morton, assessing the representational

formulas then accepted for the House of Commons and the Senate, based respectively on representation by population and by constituent section, writes of the first Dominion cabinet of 1867:

> The same thinking as to the desirability — indeed the necessity — of providing representation of both sections and population was demonstrated in the composition of the cabinet. Each section was to have four members, with the most populous providing the prime minister. The members were to represent both territorial sections and population. But the cabinet representatives were to represent regions in their sections, or provinces, and population in its actual varieties — political, sectarian, and economic interest — at least roughly and as far as possible. The Commons, it may be said, represented number, the Senate, section, the cabinet, weight — weight, colour, tone. The representative character of the cabinet was, in short, to be a much subtler thing than the representation provided by the Commons or the Senate.[4]

Unlike the circumstances which regulate the composition of the House of Commons and the Senate, the representational nature of the cabinet is wholly within the realm of custom and convention rather than of law, and this has allowed for a flexibility in adjusting the composition of the ministry to the ongoing exigencies of Canadian life.

The following general points can be made about the representative nature of the Canadian cabinet.

First, the most persistent of the traditions is that each province is entitled to at least one cabinet post, and the more populous provinces more than one. (This rule has been breached with respect to Prince Edward Island; up to 1963, that province had had cabinet representation in only 15 years of this century.[5]) On occasion, prime ministers have resorted to heroic measures in ensuring the representation of all provinces. For example, after the election of 1921 in which Alberta did not elect a single Liberal, Prime Minister Mackenzie King appointed to the cabinet a former premier of the province and found a seat for him in Quebec. In other circumstances, persons with few or no qualifications for ministerial office have been appointed to ensure provincial representation.

The general rule that every province except the very smallest is entitled to cabinet representation has in a sense been buttressed by the actions of Prime Minister Clark in 1979 and Prime Minister Trudeau in 1980 in appointing to the cabinet senators from provinces which had denied the government party representation in the House of Commons, although this practice was not followed in the Turner cabinet formed in June 1984.

The more populous provinces make claims to more than one cabinet post as a matter of course. While the claims of Ontario and Quebec in this respect have always been honoured, those of the medium-sized provinces are less well established. In the summer of 1983, there was

considerable resentment in British Columbia that the province's representation had been reduced to one by the dropping of Senator Ray Perrault from the cabinet.

Secondly, in the Trudeau period, the tradition governing the assignment of particular portfolios largely to francophones from Quebec and the virtual exclusion of such persons from other portfolios ended, presumably permanently. Between 1867 and 1965, some 30.4 percent of cabinet ministers came from Quebec — francophone and anglophone — representing fairly closely that province's relatively consistent proportion of the Canadian population.[6] However, in a study published in 1970, F.W. Gibson points out that seven portfolios — namely, the Post Office, Public Works, Marine and Fisheries, Justice, Secretary of State, and President of the Privy Council, — had been most consistently held by francophones while Finance, Labour, and Trade and Commerce have been held exclusively by anglophones.[7] Francophones have predominated in portfolios of minor importance (Solicitor General, Secretary of State) or those in which the minister controlled a large amount of patronage (the Post Office, Justice, Public Works) but were excluded or virtually so from ministerial positions related to economic management. While Prime Minister Louis St.Laurent disliked the assignment of cabinet posts on criteria other than ability, it was not until the Trudeau period that francophones in significant numbers were appointed to portfolios whose basic concerns were economic and, in one period in 1982, they occupied what might reasonably be regarded as the three most important economic portfolios of Finance, Energy and Transport.

Thirdly, particular portfolios have historically been occupied by ministers from particular regions. The minister of the Department of Regional Economic Expansion since 1969 has come from a "have-not" province, the Fisheries portfolio has usually gone to someone from a coastal province, and the minister in charge of the Wheat Board has always come from the Prairies.

Fourthly, the representational principle has evolved in a flexible way to take into account new elements in the community and to put aside those deemed no longer necessary to have representation. Until the Liberal administrations under prime ministers King and St.Laurent, the Irish Catholics as such had their claim recognized; while there were three members of this group in the last Trudeau cabinet (Mark MacGuigan, Gerald Regan and Eugene Whelan), it is unlikely that this religious affiliation had much to do with their appointments, and the same was probably true of the three Jewish ministers (Jack Austin, Herb Gray and Robert Kaplan). It was a considerable event when Michael Starr was the first person of Slavic origin appointed to the cabinet in 1957, but no one gave much notice to Prime Minister Clark's appointment of Ramon Hnatyshyn, Donald Mazankowski and Steve Paproski in 1979. Ellen Fairclough in 1957 was the first women to sit in a federal

cabinet but women's claims to representation are now well established. Recent cabinets have had at least one francophone from outside Quebec, although this was not the case in earlier periods. Thus, as claims based on religious affiliation have been put aside, the cabinet has become increasingly representative in terms of gender and ethnicity. Although recent cabinets have contained one Indian (Leonard Marchand) and one black (Lincoln Alexander), the claims of visible minorities to representation have not been established, although this will probably change in the future.

In general, then, the practices governing the representational nature of cabinet composition continue to evolve. On the regional dimension, the rule that every province except Prince Edward Island is entitled to at least one minister has almost the status of a convention. Yet a prime minister will find few fixed guidelines related to territorial representation within particular provinces. Until the past generation, the political complexes centred in Quebec City and Montreal each staked out claims for representation, but this is probably less important now. Under the Diefenbaker government, British Columbia received more representation in the cabinet than ever before but there is nothing on the public record to indicate whether the fact that George Pearkes was from Vancouver Island, Howard Green from Vancouver and E. Davie Fulton from the interior influenced the prime minister in his choice. Although Montreal, Toronto and Vancouver can undoubtedly make demands which are heeded for some representation, Canada's fourth largest city, Edmonton, has been denied such representation since 1957 apart from the two months' incumbency of Marcel Lambert in Veterans' Affairs in 1963 and that of Steve Paproski in Sports and Physical Fitness in the Clark government. While other regions such as the interior of British Columbia, northern Ontario and northern New Brunswick may make claims to representation, these are not consistently recognized. And in terms of over-representation, little was made of the fact that in the last Trudeau cabinet there were three ministers with relatively important portfolios (Herb Gray, Mark MacGuigan and Eugene Whelan) from the Windsor area.

Yet what implications does federal cabinet representation have for the Canadian system of government? The term "representation" is used in two quite different senses. The first is its composition, such that the cabinet in some dimensions reflects the Canadian population. The population includes men and women, New Brunswickers and British Columbians, members of the Canadian charter groups and persons of other origins, and so on. The nature of the diversities taken into account when prime ministers choose members of their cabinets changes over time. It is reasonable to expect that new claims will be honoured in the future as some of the present one are put aside; there might well be, for example, a recognition of the claims of visible minorities and perhaps those of

persons under 30 years of age. However, the representation of the provinces and regions in the cabinet is a persistent tradition and is overwhelmingly likely to continue whatever other claims are honoured. The representative dimensions of the cabinet's composition undoubtedly enhance that institution's legitimacy. Quebeckers, women and persons whose origins are neither British nor French undoubtedly have to some higher degree the perception that they are represented at the highest and most visible level of political decision than if some or all of these groups were excluded from the cabinet. And from an individual point of view, an ambitious Jewish politician need not believe that he or she will be denied cabinet preferment because of religion, as was David Croll a generation ago, when he was a backbencher in the King and St. Laurent governments before being appointed to the Senate.

There is, however, another sense in which the term "representation" can be used. In this second sense, an institution is representative to the extent that its members have the will and the capacity to promote the interests and values of the groupings from which those persons are drawn. These variants may be designated as "compositional" and "active" representation, respectively. It is the argument of the following pages that three sets of interrelated factors — the structure and operations of the cabinet itself, the evolving partisan/political role of ministers and the ways in which the departments of government articulate interests — impose certain constraints on the power of ministers to press the interests of the provinces and regions from which they come. Within these constraints ministers do, however, have considerable opportunities for effective regional advocacy, and recent developments in executive organization have in general enhanced these opportunities.

Structure and Operations of the Federal Cabinet

In the last two decades, there has been an ongoing rationalization of the processes by which the federal cabinet operates. These changes were begun under the leadership of Lester Pearson and continued in a much more comprehensive way in the governments headed by Pierre Trudeau. Joe Clark's short-lived government of 1979–80 showed no disposition to reverse these changes; in fact, the establishment of a 13-minister inner cabinet and the adoption of the envelope system of budgetary allocation extended the rationalizing process. It is the argument of this section that those reforms had the general disposition of decreasing the capacity of ministers to act as effective promoters of interests which were specifically regional or provincial. The extent to which the reforms effected in the Trudeau period are irreversible remains in doubt. Prime Minister Turner devoted most of his opening statement to the press conference he met on June 30, 1984, just three hours after he was sworn into office, to announcing reforms in the way that the decision-making process in

Ottawa would operate under his leadership. On the surface, these appeared to herald a partial return to the way the cabinet functioned prior to the Pearson-Trudeau period. However, it is much too early to make any assessment of these changes or of how the cabinet under Prime Minister Brian Mulroney will operate.

Federal ministries up to and including those of Mackenzie King conducted their affairs in a very informal fashion. Arnold Heeney, the first secretary to the cabinet, describes it:

> Before 1940 the decision-making processes of the Canadian cabinet seemed incredibly haphazard to someone such as myself coming to Ottawa from a St. James Street law office and accustomed to the procedural niceties of legal practice. I found it shattering to discover that the highest committee in the land conducted its business in such a disorderly fashion that it employed no agenda and no minutes were taken. The more I learned about cabinet practice, the more difficult it was for me to understand how such a regime could function at all.[8]

During the Second World War, there was a considerable rationalization of the cabinet process, particularly in the operation of the cabinet war committee. Although Mackenzie King until the end of his period in office resisted such rationalization, the procedures developed in the latter committee were after 1945 applied to the proceedings of the cabinet as a whole with the more orderly circulation of cabinet documents, the recording of conclusions and formalized ways of communicating cabinet decision for action.

It is not necessary to trace the development of the cabinet under King's three successors. Louis St. Laurent conducted cabinet affairs in a businesslike way but ministers retained a very high degree of autonomy in respect of their departments. Under John Diefenbaker, there was a development of collegial decision making without the concomitant establishment of organizational machinery to make this effective; the roles of ministers as regional spokesmen became even more important than before. Lester Pearson conducted cabinet affairs in a relaxed and informal manner; however, under his leadership there was a move toward the more structured processes which developed in the Trudeau period. One minister in the Pearson and Trudeau cabinets, Mitchell Sharp, describes these moves:

> Under Mr. Pearson, the cabinet committee structure began to be elaborated in earnest and an effort was made to prevent the introduction of items on the cabinet agenda without notice, an effort which did not always succeed. Only proposals that were contentious or involved detailed examination were referred to committees. Usually, but not invariably, papers were distributed in advance, and for the most part these papers were reasonably short. The cabinet secretariat endeavoured to promote some uniformity in presentation, but the rules were flexible.[9]

The structure and processes of cabinet decision making were radically changed during the Trudeau years. These changes may be briefly summarized.

- There was a conscious attempt to restore the dominance of ministers over the processes of policy formulation. It was perceived that in the past senior appointed officials had had an undue influence in this matter.
- There was an enhanced reliance on rationalized techniques of priority setting and the evaluation of actual and projected policies. At the highest level of abstraction, it was perceived desirable to view the whole federal government apparatus as a system, to posit goals at a very high level of generality and to subsume particular goals under more general objectives.
- There was an attempt to make the cabinet a genuinely collegial body and thus to limit the autonomy of ministers as heads of their respective departments. To this end, the staff services of the cabinet were vastly increased and most cabinet decisions came to be taken in cabinet committees.
- The influence of central agencies over the policy process was vastly strengthened. The most important of these agencies engaged in system-wide allocative functions were the Prime Minister's Office, the Privy Council Office, the Department of Finance, the Treasury Board and the Ministry of State for Economic and Regional Development.
- There was throughout a heady faith that difficulties and failures in the policy process could be reduced by the establishment of new forms of organizational machinery.

Given the lack of detailed studies on the responsiveness of this process to provincial and regional values and interests, assessment of it must be tentative. However, there would appear to have been influences at work under the newer and more rationalized procedures in the direction of making ministers less effective than before in pressing regionally specific interests and concerns.

Ministers ceased to have bases of political power independent of that of the prime minister. Prior to the Second World War, a few of the ministers in any cabinet were persons who in their own right were political barons in their own areas and who could have been left out of the cabinet or demoted from cabinet rank only at high political cost to the prime minister and his government. This has largely ceased to be so and Pierre Trudeau said in his interview with George Radwanski: "I don't think I could operate in the kind of government system they have in Japan, for instance, or even Israel for that matter, where each minister brings his own power base. . . ."[10]

The more collegial processes of cabinet-decision making inhibited ministers from pressing the interests of their provinces and regions in the way this was done in the past. Sharp puts it this way:

> The main characteristic of the Trudeau cabinet . . . has been the application of the principle of collegiality, the practical application of the concept of joint responsibility. In the Pearson government of which I was a member throughout, we discussed and agreed to or disagreed with recommendations of individual ministers and accepted responsibility for the actions of our colleagues resulting from cabinet decisions. However, Mr. Pearson did not require ministers to document their proposals fully and did not, generally speaking, require detailed scrutiny by other ministers, although of course there were exceptions in matters of major political concern. Under Mr. Trudeau all proposals must be fully documented, their conclusions and recommendations based on a careful consideration of alternatives and pre-sentation of the arguments pro and con. Lengthy documents must be accompanied by a summary in both official languages. Where appropriate, financial implications must be specified. Caucus consultations must be described or reasons given if these have not taken place. Effects on federal-provincial relations must be described and if an announcement is to be made, the arrangements for publicity must also be specified.[11]

In this collegial context, there was less room for the freewheeling minis-ter intent on advancing the interests of his province or region, as did Clifford Sifton in the Laurier cabinet or Charles (Chubby) Power, Jimmy Gardiner and Ian Mackenzie in the King cabinet, although more recently Allan MacEachen, Lloyd Axworthy and Romeo LeBlanc still exerted considerable influence in the Trudeau cabinet on behalf of their regions.

Although there has been some effort to make the most important committees representative, cabinet committees (where many of the most important decisions of government are in fact made) are inevitably less representative of all provinces and regions than is the full cabinet. Furthermore, ministers are often represented in these committees by appointed officials from their respective departments and from central agencies. Colin Campbell writes that this situation

> . . . has led to a blurring of the distinction between the role of ministers and that of officials. . . . Under current practice, public servants directly con-front ministers on a footing that makes them virtual colleagues. Weak and junior ministers find themselves particularly disadvantaged vis-à-vis deputy ministers. These latter, in many cases, actually boast much stronger per-sonal ties with both the prime minister and senior members of the cabinet.[12]

Whatever values and interests members of the appointed bureaucracy may enhance, those of a specifically regional nature are not foremost.

The rationalistic procedures of government decision making have a pervasively anti-political disposition. In a short article first published in

1971 and revised in 1977, George Szablowski analyzes the implications for the political process of what he designates as the "optimal policy-making system," which had been introduced in Ottawa. He writes:

> Optimizing is concerned with the relations among objectives. Thus, a decision-maker considering the adoption of a specific policy aiming at a specific goal must take into account all the other policy goals relevant to the issue area and the resource requirements needed for their implementation. He must also examine all major alternatives. He knows that the resources available to him are limited, that the assignment of additional resources to each of the policy goals pursued is likely to have only a marginal effect, and that the relative overall performance ("probable aggregate real output") is likely to decline if he yields to the incremental approach to policy-making.[13]

Szablowski argues that the new processes of decisional technology had changed the relations between the prime minister and his cabinet colleagues from "transactional" to "moral." Thus:

> The traditional relationship between the Canadian Prime Minister and his cabinet colleagues has been transactional. It permits the Ministers to retain regional loyalties and to represent regional interests within the Cabinet. It does not demand from them a moral commitment to the leader. It leaves them free to bargain and to consolidate their own influence while attending to the business of governing as political heads of their departments. It would appear now, however, that this traditional transactional relationship is undergoing a transformation. Through the means of the cabinet committee system, the Prime Minister divides his leadership role into specialized functions which he then distributes as committee chairmanships to some of his transactional colleagues; for himself he retains the overall competency: priorities and planning. Each cabinet committee, receiving staff support either from PCO or from the Treasury Board Secretariat, acts as a socializing and educating agency, providing common experiences in the ongoing decisional process. In this way the transactional ties are modified and new relationships emerge characterized by specialization and inspired by the optimal ethic. The committee system cuts across the departmental portfolio divisions and assigns to each committee chairman a specific, functional policy area: economic; social; external and defence; science, culture and information. A small high-level personal "bureaucracy" is thus created, which no longer adheres to the purely pragmatic, businesslike attitudes toward the leader, but becomes increasingly burdened with normative considerations. Its members tend to discard regional loyalties and to refrain from bargaining on behalf of regional interests: they are no longer prepared to play with ease the accommodation roles.[14]

The "computer revolution" has reduced the sensitivity of the governmental system to regional/provincial and other political interests and values. In his presidential address to the Canadian Political Science Association in 1983, E.R. Black says of the implications of the widespread use of electronic data processing in the governmental decision process:

The combination of technological, technical and professional factors is a powerful set of values. Decision-making which is highly dependent on electronic data-processing gives this set of values high priority. Why? Essentially because they are built into the computer-based system, and they are taken for granted because such values are virtually invisible to people reading the "results."

In contrast stands the second set of values, the political, what the public is seen to want or need. These are the values that are treated as variables. They are stated explicitly, given various weights, and manipulated this way and that. The result is that the political values end up as a small tail trying to wag a big, very preoccupied dog. In short, scientific decision-making as practised in government poses a major threat to the pre-eminence of political choice.[15]

Black predicted that a major power shift was under way in government toward those actors competent in the new methods of electronic data processing. He concluded pessimistically that direct popular control over decision making by the representatives of the people was in decline:

The computerization of government could mean the need of meaningful public and disciplinary interest in parliamentary affairs. In pursuing the fickle god of efficiency, Bagehot's famous buckle, the cabinet, has already turned from honest metal to sheer brass. Meantime, the triumph of information technology is busy stripping our parliamentary system of its last shred of dignity — public attention.[16]

The distinctively partisan/political role of ministers significantly decreased during the Liberal regime. This is examined in the next section.

In general, the cabinet and the role of ministers have changed significantly in the past generation. The actual and perceived unresponsiveness of the federal government to regional values and interests can in large part be attributed to these changes. Even those who have favoured such reforms in structure and organization have manifested some concerns. Mitchell Sharp notes that as minister he spent 12 to 15 hours a week in cabinet and cabinet committee meetings. He concludes that:

Under Mr. Trudeau, we worked far too hard and spent far too much time in Cabinet and Cabinet Committees discussing each other's proposals. Decisions might have taken less time, we might have had a better perspective on events and more time for politics had we delegated more to our civil service advisors and left more time for reflection.[17]

Along with the prime minister, the chief architect of the new decisional technology was the clerk of the Privy Council, Michael Pitfield. Pitfield remarks:

In relation to the decision-making process and organization, it seems to me that we have yet to really come to grips with our most difficult problem of scarce resource allocation, namely the effective use of Ministers' time. The

developments of the last ten years have been costly in terms of what they have detracted from the performance of ministerial duties in other than policy-making: communicating with the public, representing their constituencies, and administrating their departments, for example. However great the importance of policy, it seems to me no more important in the total scheme of things than these other duties and if they are not to suffer it is vital that we find means of helping Ministers discharge them.[18]

Cabinet Ministers and Political Parties

In the earlier period of Canadian history until the beginning of the Second World War, the political party was the major institution relating the individual citizen to the governmental system. The cabinet minister was a crucial actor in these interactions. This section discusses fundamental changes to both the party and the role of ministers in the party; these changes explain in considerable part the unresponsiveness of the federal government to regional interests and sentiments.

Until the past generation, ministers assumed the major responsibilities for party organization in their respective provinces. J.K. Johnson has written of the pre-Confederation Conservatives:

> Before Confederation there was no consistent province-wide Conservative party organization run from a central office, nor a permanent central office for Upper Canada alone. . . . Between elections, in fact, it is hard to find much evidence of formal party organization at all, aside from occasional meetings in caucus of the elected members of the party. The day-to-day central organization of the party in Upper Canada consisted mainly of one man, John A. Macdonald, who, working out of his office at the provincial capital (wherever it happened to be), planned party strategy in and out of the legislature, arbitrated disputes, provided information and direction to party newspapers, dealt generally with party problems as they arose, and, certainly not least in importance, dispensed government patronage.[19]

Extra-parliamentary party organization was slow to develop in Canada. Ministers were given chief responsibility for political organization in their respective provinces, although from the end of the First World War onward there was an increasing involvement of persons from outside Parliament in fund-raising.[20]

The major element in sustaining the cabinet minister in his partisan political role was patronage. F.W. Gibson has written:

> The patronage which was then available for distribution consisted, in the main, of a large number of small items: minor jobs, assistance for individuals in want or in trouble, and small expenditures for roads, bridges and harbours, for post offices, customs houses and other works of local improvement. All these items — the principal components of the old-fashioned "staple" patronage — could be dispensed, widely and frequently, among those who worked from and subscribed to the party in power, and

they were, in large measure, what held each party together and gained for it the support it needed.[21]

The distribution of patronage was the chief activity of the cabinet:

Since there was little government, the burdens of administration and law-making were light, and the leaders of the political party in power, the cabinet, devoted most of their time and energy to the intricate task of holding together a majority in the legislature and of employing, for this purpose, the patronage at the disposal of the government. In this society, in other words, the principal role of political life was not the administration of existing law and the making of new laws, but the rewarding of those who took part in political life by the distribution of patronage. Patronage was a natural currency of public life, and the power to dispense it was what, for the most part, gave a cabinet minister the authority and prestige that he desired. "The distribution of patronage," Sir Wilfrid Laurier's biographer wrote of the Laurier administration, "was the most important single function of government."[22]

So far as communities were concerned, the chief link to this process was the relation between the ministers and local MPs or defeated candidates. In this way, the power of party and government were perpetuated and made visible in every part of Canada.

The changes in the nature of political patronage and its distribution appear to have been a major factor in the evolving role of ministers and their relations with the provinces and regions from which they came. Patronage may be defined as those benefits from public resources conferred on individuals and groups by members of the governing party according to criteria not embodied in law or regulations made under the authority of law.[23] Patronage is characteristically conferred in recognition of some form of past support for the party in power and/or possibilities of future support.

Members of the governing party may use public resources to strengthen their partisan position by actions other than the distribution of patronage. For example, affirmative action programs in the public service or the provision of tax advantages to particular elements in the population may be tailored to secure the partisan support of specific groups. However, these measures are embodied in law and in statutory instruments made according to law. Most are distributed according to criteria that do not take the partisan affiliations of the specific individuals or groups who receive them into account, despite the perception by some that Liberal job creation programs and capital grants were influenced by partisan considerations in their allocation. In fact, all but a very small proportion of the benefits given by government are allocated otherwise than by patronage and the proportion seems to be on the increase. However, the persistence of patronage remains an important element in the Canadian political process and in maintaining the allegiance of a significant number of citizens to their political system.

These general points can be made about the patronage process in Canada. First, changes in federal public service procedures have cut the traditional ties of patronage between the elected officials of the government party and their constituents. Establishment of the merit system in public service employment and promotion, together with other procedures related to such matters as the letting of public contracts, have inserted a bureaucratic system between cabinet ministers and other members of the governing party and the public. So an ordinary citizen looking for employment in the public service will ordinarily seek it through the local office of the Public Service Commission rather than by approaching the MP, defeated government candidate or local organization of the governing party in the riding. So far as positions at the disposal of the party in power are concerned, there are a significant number to be awarded by patronage but these tend in a general sense to be elite positions. Joseph Wearing estimates in his 1981 book that there are about six hundred positions annually filled through order-in-council appointment.[24] Christina McCall-Newman in *Grits* estimates that there are about 350 full-time posts belonging "by tradition and by statute" to the prime minister alone.[25] But, to repeat, these are for the most part high-status posts not accessible to ordinary citizens. Paul Pross in a magisterial essay published in 1982 describes how the functionalist and technocratic imperatives of what he calls "the special interest state" have resulted in the displacement of political parties by the interest groups.[26] This phenomenon is discussed later in this chapter.

Secondly, although there is little published information on this matter, it appears that ministers have come to share the distribution of at least some kinds of patronage. Under both the Trudeau and Clark governments, there was an official in the Prime Minister's Office whose responsibility was advising order-in-council appointments. For example, McCall-Newman describes the crucial role of Senator Keith Davey in patronage matters prior to the defeat of the Liberals in 1979.[27]

Until the end of the King–St. Laurent period, cabinet ministers undertook the major responsibilities for party organization and for election campaigns in their respective provinces and regions. The changes in the organizational structure of the Liberal party that took place after the party's defeat in the general election of 1957 decisively and presumably permanently altered this previous pattern of ministerialism. These developments are admirably described and analyzed by David Smith.[28] The major impetus for change in the late 1950s and the 1960s came from party reformers in Toronto who believed that the dominant role of ministers in party organization had been the primary cause of the party's defeats in 1957 and 1958. The changes which were effected brought a much more professional kind of organization to the party than existed before. They relied heavily on technological advances relating to polling and the use of the mass media, especially television, and advertising.

They also distanced the federal from the provincial wings of the party, and involved national party headquarters directly in campaign activity. Smith describes the machinery as it was put in place for the 1963 election:

> The new prime minister . . . appointed in each province (in consultation with the provincial Liberal leader, provincial president, and respective cabinet minister) a federal campaign chairman and a four-man committee. The new committee had four principal functions: to act as a continuing federal electoral organization, to link federal and provincial Liberals, to be "a valuable political sounding board," and "to facilitate grass roots consultation when cabinet is considering appointments."[29]

There were other changes in party organization in the Trudeau period. Soon after the election of 1968, there was an attempt, which for the most part failed, to democratize the party and to involve rank-and-file Liberals in the formulation of party policy. Also there was established the "political cabinet" composed of the cabinet, representatives of caucus and the extra-parliamentary National Liberal Federation to discuss such problems as the place of the MP in the political system, the financing of elections and the growth of regional discontent. After the near-disastrous 1972 election campaign in which the Liberals came very close to losing power, the prime minister instituted a structured system of regional political responsibility for his ministers. George Radwanski describes this system as it existed in 1977:

> Each minister must visit every riding in his area of responsibility at least once every six months; a senior member of the minister's staff must visit each non-Liberal riding in the assigned area every two months; and the minister is to meet the Liberal MPs from his area every two months. Based on these activities by the minister and his aide, each minister must give Trudeau a detailed bi-monthly report on each assigned riding. The report must cover concisely but in detail: the minister's activity and his assistant's activity; the membership situation, including the target figure and the change in membership from the previous report; finances . . . opposition activity in the riding; the riding association's programs; the activities of the Liberal MP, if there is one; the activities of special groups, such as youth wings; and feelings in the riding about the government's performance on both national and local issues.[30]

Stephen Clarkson points out that the monitoring of this elaborate system of ministerial reportage was carried out by the Prime Minister's Office. He remarks that this

> . . . reinforced the shift that was quietly taking place in the nature of the Liberal party: from a cadre organization working in cooperation with the party leader and the cabinet to a personal clique in which the leader and his personal staff dominated both the cabinet and parliamentary party on one had and the lay party on the other.[31]

So far as the previous Liberal government was concerned, the older patterns of ministerial dominance over partisan/political activity was destroyed. One may reasonably assume that, as ministers were increasingly occupied with their governmental role as heads of departments, a decreasing proportion of their time and energy was available for activities of a specifically partisan nature. Moreover, changes in public service procedures reduced the opportunities for ministers to sustain themselves through patronage. Even the distribution of elite patronage appointments had to be shared with others, most notably key individuals in the Prime Minister's Office. In campaign activity, ministers were no longer as dominant as before. The high degree of organizational separation between the national and provincial wings of the party meant that federal ministers were no longer sustained by their former influence over the provincial elements of the Liberal party.

Smith attributes the decline of the Liberals on the Prairies in large part to changes in party organization from 1957 onward. His analysis of the unresponsiveness of party and government to that region may have had more general application in other parts of Canada as well:

> If it was true that the former [ministerial] "barons" had adopted a limited and narrow outlook on the nature of political rule, this perspective was not wholly without redeeming virtue. As intermediaries, cabinet ministers might complicate political strategy; they might even distort national priorities — for with them politics was never tidy — but they were nonetheless keen interpreters of the local scene and, in return, committed spokesmen for party policies. Vertical integration, with a federal cabinet minister lord of the provincial organization, was never free from friction even where it worked well, as in Saskatchewan. Yet, there were reciprocal benefits at both levels, especially when Liberals were in power in each. Even when the provincial party was in opposition it could still claim a share of federal patronage as well as a measure of influence over federal policy.[32]

Bureaucratic Organization and Provincial/Regional Interests

Members of the federal cabinet have heavy demands on their time and energies. The most insistent of these demands relate to the roles of ministers as heads of departments. How well ministers perform their departmental role in the view of the prime minister, their cabinet colleagues and the attentive public in most cases determines the claims of these persons to continue in cabinet office or to be advanced to more desirable portfolios. Because of the crucial importance of the departmental function in the activities of ministers and their political career prospects, the way in which the departments of government are structured in large part determines what values and interests are effectively promoted by ministers individually and the cabinet collectively.

In a perceptive paper delivered in 1965, J.E. Hodgetts turns his attention to the current emphasis on regionalism in the federal and provincial governments and among students of public administration. Working within the framework of systems analysis, Hodgetts concludes that "regionalism is not part of the demand inputs entering the system, but is a creation of the political system itself."[33] Thus the various regional units of administration are in a sense artifacts of the administrators themselves rather than independent sources of political demands. Governments in Canada create their own sources of regional demands and regional supports because, unlike in the United States, party discipline in the House of Commons frustrates the articulation and aggregation of regional interests. In the American case, the procedure of electing the president unites states having either the balance of power or a veto power over presidential election.

Although Hodgetts attributes the absence of effectively articulated regional demands largely to the parliamentary form, Donald Gow explains the unresponsiveness of the federal government to regional and cultural interests in terms of the way in which departments are structured.[34] The central concern of most departments is either with particular industrial groupings such as agriculture, transportation, forestry and so on, or with particular social categories such as veterans, Indians, old people and so on. After analyzing the ways in which the departmental bureaucracy dominates ministers, Gow writes:

> Unless a minister was very clever, the problems which got identified and had their "issues" stated were those within the department's own frame of reference. Since the frames of reference of normal departments are drawn on the basis of industries or social categories, those problems which come up within a regional or cultural context are ignored, or are not seen clearly. With an eye to the integrity of their "little society" almost any bureaucracy will resist answers to cultural and regional problems which may involve loss of functions.[35]

Not only were the department of government unresponsive to cultural and regional factors, but also the "system-wide allocative actors" in the executive — cabinet ministers, members of the Department of Finance and the Treasury Board, deputy ministers — were not institutionally equipped to provide an effective counter-balance to this unresponsiveness.

In the broadest of terms, public service professionals, whether they are specialists in the provision of particular kinds of services or in the art of administration as such, have a pervasive disposition against territorially bounded particularisms. Samuel Beer in his argument about the application of scientific and technological knowledge to the governmental process writes:

> The knowledge of the professional as of the scientist is theoretical and general. It can be applied to similar problems wherever and whenever they

arise. What the professional brings to government is not just how to cope with a particular problem at a certain time and place but rather a preparation to deal with all such problems, anywhere, anytime. His professional equipment directs him to work through and enlist the initiative of the widest possible jurisdiction.[36]

In Beer's analysis, modernization is the major element in the centralization of the American system with the corollary that regional, state and local factors have to a large degree been put in abeyance. The Canadian federal system is less centralized largely because the balance of specialized bureaucratic competence is weighed less heavily in the favour of the national government in respect of the provinces.

Paul Pross analyzes the complex set of factors pushing Canada a long way toward becoming a "special interest state," which he defines as a

. . . polity in which policy communication is so arranged that interests are first and foremost identified and drawn into communications with government, not through their geographic or spatial affiliations, but through their specialized contact with a functionally oriented arm of government.[37]

This kind of functionalism has resulted in a decline of party politics and in particular of local party organizations and other local institutions. These are virtually ineffectual in the face of the sweeping regional, national and international considerations that influence the modern political economy. The merit system in the public service and the methods of government reorganization adopted since the Glassco Commission report have caused the federal executive apparatus to become increasingly unresponsive to spatially delineated interests:

It is not the function of ministers, Glassco argued, to work their departments, but to see that they are competently worked. In accepting that argument and in implementing it, however imperfectly, the federal cabinet loosened yet another of its ties to the party system of earlier years. Just as the inherent regionalism of the spoils system had been undermined by merit, so the residual regionalism of political plum pudding was demolished by cost-benefit analysis and the centralization of supply and service functions. The inadvertent localism of graft and corruption has not entirely disappeared — the unsynchronized structure of the Canadian economy keeps it alive — but it is increasingly peripheral to the main business of public policy.[38]

Pross suggests tentatively that the factor with the most profound effect on the development of the special-interest state is "the reorganization of central policy structures which has occurred in Ottawa and most provincial capitals in the last fifteen years." In this development, ministers have

. . . won a degree of independence from bureaucratic manipulation but in the process ministers have become bureaucrats themselves. . . . The sea-change that politicians undergo as they become ministers must surely mean that

they become less and less capable of appreciating the local needs and aspirations that have been the well-spring of party influence. Increasingly they are oriented to the demands of the special interests of their policy fields.[39]

Pross realizes that there are still some remaining obstacles to the development in the most complete sense of the special-interest state in Canada. The market economy is still relatively dominant in eastern Quebec and the Atlantic provinces. This area lacks a technostructure and does not possess the kind of economic differentiation that makes functional representation possible. Further, the special-interest state lacks the "legitimacy of the party system with its roots in representative government" and "as long as cabinet ministers retain a sufficient sense of their constituency ties to remember that fact and as long as career officials pay homage to it, special interest communications cannot consistently dominate policy-making." However, "these constraints . . . are a thin bulwark against the growing pressure of specialization."[40]

In the broadest terms, the executive apparatus of the government of Canada is structured and operated so as to emphasize values and interests other than those which are territorially bounded by provinces and regions. This is so despite the large number of federal employees subject to the Public Service Employment Act working outside the national capital region (in 1982 two-thirds of the 222,582 in total). Despite a relocation program begun in 1975 to deconcentrate elements of the federal public service outside Ottawa-Hull and other major metropolitan centres, Kenneth Kernaghan has pointed out that there is a striking resemblance between the extent of their deconcentration in the departments between 1983 and 1971.[41] While deconcentration is no doubt important in making the federal executive apparatus more responsive than otherwise to regional values and interests, the situs of crucial decisions still remains in the national capital region. As of August 1983, some 2,664 or 73.67 percent of 3,616 federal employees in the management categories worked in the national capital region. Of the 730 persons in the most senior categories, some 558 or 76.43 percent were in the national capital region. Perhaps just as significantly, in 1983, only 20.64 percent of 2,069 federal employees in the next most senior categories had had regional experience, of which 90 percent were in federal field offices and the rest served with provincial governments or the private sector.

The Regional Role of Ministers

In the past two decades, fundamental changes have altered the relation between ministers and both the policy-making apparatus of the government of Canada and the governing political party. Obstacles raised by these changes have impeded ministers in playing a powerful role as

advocates of the provinces and regions from which they came. However, the ways in which such recent ministers in the Trudeau cabinet as Lloyd Axworthy, Romeo LeBlanc and Allan MacEachan were able to advance the interests of their respective regions and provinces demonstrate that those obstacles are not completely insuperable.

The various ways in which the federal government has organized its machinery for regional economic development is a useful prism through which to examine the regional role of ministers and the regional responsiveness of this government more generally. These developments are described and analyzed in detail elsewhere[42] and are dealt with here in a very summary form.

The Diefenbaker administration was the first of the postwar federal governments to give specific attention to regional economic development. In the immediate postwar period, the emphasis was on the responsibility of Ottawa to ensure adequate levels of aggregate demand according to the Keynesian imperatives with little concern for the regional incidence of policies. The Progressive Conservative government which came to power in 1957 drew a significant amount of its political support from parts of the country which had been by-passed by the general prosperity. The new prime minister reacted against what he regarded as the Liberals' "GNP mentality." For this reason, the Agricultural and Rural Development Act was enacted and the Atlantic Development Board established. When the Liberals under Lester Pearson returned to power in 1963, the general idea that the federal government had a responsibility to support economic development in the poorer parts of the country was firmly established. In the 1963–68 period, new initiatives were taken with the establishment of the Fund for Rural Economic Development, the Area Development Agency and the Department of Forestry and Rural Development.

The establishment of the Department of Regional Economic Expansion (DREE) in 1969 was the first attempt of the federal cabinet to put in place an administrative apparatus for the coordination of regional economic policy. Previously, ministers with strong regional support, such as Jack Pickersgill in the St. Laurent and Pearson cabinets and Jean Marchand in the Pearson and Trudeau cabinets exercised effective control over the regional development activities of line departments. It was the objective of DREE to change all that. The department was given the authority for existing programs of regional development, with Jean Marchand as its first minister.

In its early years, DREE took a highly centralized approach. After 1973, however, the department underwent a radical reorganization with the establishment of a much more decentralized system through regional offices and a more flexible and multi-dimensional approach to economic development. This new approach led directly into the regime of the general development agreements (GDAs), ten-year enabling agreements

with the provinces and subsidiary agreements to give effect to those broadly defined goals. Such arrangements were implemented by joint management committees with equal representation from both governments, including the provincial director-general of DREE and a senior provincial official.

Despite their initial popularity with the provinces, the GDA procedures incurred increasing hostility from both levels of government. Provincial politicians in some cases discovered that they had little influence over programs once these were in place. Their federal counterparts became increasingly unhappy about the lack of political credit from DREE-supported activities and about the relative absence of "federal visibility" with respect to payments to the provinces on behalf of medical and hospital services and of post-secondary education.

In late 1978, a new approach to economic development was put in place with the establishment of a Board of Economic Development Ministers. This board was to be chaired by the minister responsible for the newly created portfolio for Economic Development, and its other members were to be the Deputy Prime Minister, the President of the Treasury Board, the Minister of Finance as well as the ministers of Science and Technology, Labour, Regional Economic Expansion, Employment and Immigration, National Revenue and Small Business, Industry, Trade and Commerce, and Energy, Mines and Resources. The Minister for Economic Development and the board were provided with a Ministry of State for Economic Development to act as support staff. This minister was given sweeping powers to formulate and develop integrated policies in respect to economic matters, to review proposals by departments prior to their submission to Treasury Board, advise Treasury Board on the allocation of assistance programs for economic development and to undertake research and evaluate existing industrial development programs.

The series of reforms announced in January 1982 emphasized "federal visibility" and the desire of the government to make more prominent the regional perspective on federal economic policies, with the "regions" in such cases being designated to correspond to the boundaries of the provinces. The major elements of the 1982 changes were these.

- DREE was dismantled and its regional programs were transferred to a new Department of Regional Industrial Expansion along with programs in the Department of Industry, Trade and Commerce for industry, small business and tourism.
- The Cabinet Committee on Economic Development and the Ministry of State for Economic Development were redesignated to signify the government's intention that the regional perspective would be brought to bear on the work of all economic development departments and in all economic decision making by the cabinet.[43] Thus, there was to be the Cabinet Committee on Economic and Regional Development and

the Ministry of State for Economic and Regional Development (MSERD).

- All sectoral departments were directed to "improve their regional capabilities and to build the regional dimension into their internal policy and development and decision-making processes," now that responsibility for economic development in the regions would not be the distinct mandate of a single department.[44] Peter Aucoin and Herman Bakvis point out that this directive meant that departments were to decentralize not only their operations, which many had done or had begun to do, but also policy analysis and development.[45]
- In each province was established a regional office of MSERD headed by a senior official, the federal economic development coordinator (FEDC). These FEDCs their offices were charged with gaining a sophisticated grasp of the needs and opportunities in each province, with facilitating the coordination of federal programs within provinces and with facilitating federal-provincial and public sector-private sector cooperation. To carry out this mandate, FEDCs organized "regional councils" of representatives of all departments whose ministers formed the Cabinet Committee on Economic and Regional Development.

Aucoin and Bakvis have made a detailed analysis of the 1982 reforms.[46] There was here a more thoroughgoing attempt than before to incorporate provincial/regional perspectives into federal economic development policy, largely motivated it seems by the quest for federal visibility. A crucial element in the new reforms was the relationship that developed between the FEDCs and the regional ministers. Although this varied from province to province, these relations became in some cases close and supportive. Aucoin and Bakvis note a new development in Canadian politics with the administrative state as a substitute for the traditional political party as a basis for cultivating political support and building political power.[47] On the other hand, some ministers were dissatisfied with the complexity of the decision-making process in the MSERD regime and the consequent undue influence of appointed officials in the process.

Aucoin and Bakvis conclude that in the Trudeau years the "phenomenon of the regional minister" had not really receded although he or she had a lower profile than before.[48] The 1982 reforms gave new opportunities for this role of regional advocacy. Under those arrangements, Lloyd Axworthy as minister of transport was able to benefit vastly the province of Manitoba not only by way of the resources deployed by him as minister of this department but also through a supportive relationship with the provincial FEDC and the latter's staff. It must be emphasized that, for Axworthy and other ministers, this political support was built through the administrative apparatus of the government of Canada

rather than the Liberal party. It is almost axiomatic that such developments increase the politicization of the bureaucratic process.

The Representative Bureaucracy Issue

The discussion of the federal cabinet above distinguishes between compositional and active representation. The general conclusion is that ministers continue to represent regions but are prevented from being effective advocates of the provinces and regions they purportedly represent. Then, in their place, can a regionally representative public service lead to a regionally responsive bureaucracy?

There is a relative paucity of information on the provincial/regional origins of members of the federal public service. In their study of the senior personnel of federal central agencies, Colin Campbell and George Szablowski found:

> Except for the Maritimes, Canada's various regions are adequately represented among central agency personnel. And central agents' jobs just prior to their entry into the federal bureaucracy also seem to have covered a fair cross-section of the country.[49]

There is a common opinion that a disproportionate number of francophones in the federal public service come from outside Quebec. In a study on middle-level public servants from five federal departments, Christopher Beattie finds that 51 percent of francophones surveyed were born in Quebec and 40 percent in Ontario.[50] However, the Public Service Commission does not collect information on the regional/provincial origins of public servants and there is little hard evidence on the matter.

So far as the French-English duality is concerned, federal language policies over the past three decades have had three objectives:

- to enhance the capacity of the federal government to communicate with citizens in whichever of the official languages the citizen chooses;
- to increase the proportion of francophones in the public service, particularly in the more senior categories; and
- to provide an environment in which francophones will increasingly be able to use their mother tongue as the language of internal communication.

The relations between the first two objectives are complex. In principle, the first could fully be met by a public service composed entirely of bilingual anglophones. While this may never occur, a 1982 report of the Public Service Commission states that 39.6 percent of the 54,936 positions classed as bilingual were occupied by anglophones and, most significantly, that anglophones held 76.8 percent of the 2,338 bilingual posts in the management category.[51] The Bibear report recommends

that there be a thoroughgoing reclassification of bilingual posts in the public service based much more explicitly than the existing ones on the linguistic requirements for such posts and that the standards of the second-language competence for bilingual positions be made more stringent. It is reasonable to conjecture that the government's refusal to act on these recommendations was based largely on the assumption that a radical decrease in the number of bilingual positions would lead to a consequent decrease in francophone participation.

There is considerable information about the French-English composition of the federal public service. In the broadest of terms, there was a long-term decline in the proportion of francophones between Confederation and the end of the Second World War, and this proportion has increased moderately but steadily since 1946. This decline was most precipitous in the period after the introduction of the merit system and veterans' preference at the end of the First World War. The Royal Commission on Bilingualism and Biculturalism in its 1969 report published a detailed account of the French-English composition of the public service, which showed that francophones were in relative terms under-represented in the senior categories although the Francophone presence "was relatively strong . . . in senior and high-paying posts filled by appointment through Order-in-Council."[52] At the end of 1982, some 26.4 percent of federal public servants were francophones, and 21.1 percent of the management and 20.1 percent of the scientific and professional categories were francophones.

Along with efforts to increase the proportion of francophones in the public service, the government since 1974 has undertaken to enhance the numbers and proportions of women, aboriginal peoples and disabled persons. In Nova Scotia, there has been a special program to enhance the number of blacks. Such programs have not been conducted on the bases of assigning quotas to these targetted groups. It is important to point out that there is no explicit policy to ensure that either individual departments or the public service as a whole are regionally representative in composition. However, in its advertising of positions and its establishment of offices throughout the country, the Public Service Commission has attempted to secure equality of access to the service to persons from every region and province.

Yet is a bureaucracy which is representative in composition — whatever the dimensions of representativeness — inevitably a responsive bureaucracy? The argument that links representativeness to responsiveness rests on two propositions: that the individual public servant will have the desire and opportunity to promote the interests of the group in which he or she had origins, and that early socialization is a decisive determinant of the public servant's behaviour.

Robert F. Adie and Paul G. Thomas point out with respect to the first defence of a representative bureaucracy:

Implicit in the concept of a representative public service is the assumption that the public servant will actually function on behalf of, or in the interests of, the group from which he or she originally came. Since one of the justifications for the concept is that public policy will be developed and administered by someone who is intimately familiar with the group's problems and wishes, it should follow that that representative does indeed respond to those concerns. Otherwise, the apparent value attributed to representativeness is largely lost. What remains is an apparently democractic appointment system.[53]

Most public servants in their daily work have little opportunity to advance the interests of the groups from which they are drawn whether these groups are defined in terms of gender, ethnicity, region, official-language affiliation or other axes. Does it much matter in terms of policy outputs that francophones are very much underrepresented in the management category of Environment Canada? Would our transportation policies be different if a higher proportion of members of Transport Canada were women? Is it of any particular consequence from the point of view of policy responsiveness that two agencies which do not deal directly with the affairs of handicapped people have very different proportions of disabled persons on their staffs? In some circumstances, the composition of a department or agency might matter in terms of policy responsiveness. It is probably of some consequence that while the first two commissioners of Official Languages were anglophones, most of the staff is francophone. And it would similarly be consequential if most of the senior officials dealing with the affairs of the native peoples were persons of aboriginal origin. Yet, for the most part, the work of public servants gives them few opportunities to advance the interests specific to the groups from which they are drawn.

The second assumption of the advocates of representative bureaucracy is that the origins and early experiences of bureaucrats are the decisive determinants of their behaviour. The contrary assumption is that the institutional roles and experiences of public servants are more crucial. In their study of 142 federal legislators and 90 senior federal public servants based on survey data collected in 1969–70 Janine Brodie and Bruce Macnaughton conclude that institutional factors are more important:

> Institutional variables were found to be better predictors of elite attitudes than were sociological variables even after the affects of the latter had been controlled statistically. The only exception to this pattern was on the measure of attitudes towards free enterprise and democracy. The age of the respondent was found to be the only statistically significant predictor of attitudes towards this item.[54]

The Brodie-Macnaughton findings are of course suggestive rather than completely conclusive with respect to the importance of institutional

position and experiences in determining bureaucratic behaviour. Yet these findings reinforce a more impressionistic observation. Institutions themselves are powerful agents of socialization and those who attain the senior positions in them are usually those who are most fully socialized to institutional values and perceptions.

As is the case with the cabinet, the regional representativeness of the federal bureaucracy does not lead directly to regional sensitivity. Therefore, to the degree to which this bureaucracy is in fact unresponsive to regional values and interests, this is not primarily a result of the provincial/regional origins of its members. The gateway to advancement in the federal public service has increasingly become education at the graduate level and it is reasonable to suppose that this dimension of prepublic service experience is a more important socializing factor than earlier experiences related to class or regional background. Even more crucially, at the executive levels of the public service, most officials have had all their bureaucratic careers in the national capital region and it is reasonable to suppose that socialization within the Ottawa-Hull environment is the most crucial determinant of their working behaviour.

Conclusions and Recommendations

So far as the focus of this chapter is concerned, there have been in the past two decades or so, two contradictory forces at work in the structure and operations of the federal executive. First, there has been the movement toward rationalization. At the highest levels of abstraction, this has meant dealing with the apparatus of the central government as a single system with the corollaries of specifying system objectives at a high level of generality, ranking these objectives, subordinating less fundamental to more fundamental goals and engaging in a continuous process of evaluating the efficiency and effectiveness of actual and proposed programs. In an organizational sense this rationalizing impulse has assumed many forms — Program Planning and Budgeting System (PPBS), Management by Objectives, long-term budgetary projections, the vastly extended role of cabinet committees, the increased size and power of central agencies, ministries of state, the increased reliance on research and so on. It is significant that this impulse, particularly in the early Trudeau years, emanated largely from politicians attempting to regain the dominance over the decisional process which they perceived had been surrendered to appointed officials. Yet as Pross points out, " . . . cabinet have won a degree of independence from bureaucratic manipulation but in the process ministers have become bureaucrats themselves."[55]

Secondly, elected members of the governing party, both MPs and cabinet ministers, have had the continuing incentive to distribute the

benefits of the state so as to enhance their political visibility and hence political positions in the areas and regions from which they came. This has been no easy task. Pross is again perceptive in pointing out that "technocracy does not easily fit into a political system that is governed by geography."[56] Many government departments are oriented toward specific clienteles that are not for the most part spatially delineated. However, throughout recent years, ministers and government MPs have shown some considerable capacity for operating the system to enhance their local and regional visibility and political power. It must be emphasized that, in contrast with earlier periods of Canadian history, these power constellations have been built predominantly on the executive apparatus of government, with the consequences of further atrophying the political parties and politicizing the bureaucratic process. There seem to be few realistic possibilities for restoring the older system in which the primary tie between the citizen and the operations of government was through the political party. The influences toward Pross' "special interest state" are thus very strong, a regime in which

> . . . policy communication is so arranged that interests are first and foremost identified and drawn into communications with government, not through their geographic or spatial affiliations, but through their specialized contact with a functionally oriented arm of government.[57]

Particularly in the light of the 1982 reforms, Pross may underestimate the possibilities for changes which would give decisive strength to spatially delineated interests. Yet he is surely accurate in his assessment that political parties as such, especially the local organization of political parties, have become increasingly marginal to the processes by which public benefits are distributed.

In the past decade, the balance between the technocratic impulses, at their zenith in the first term of the Trudeau government, and the political impulse has been shifting in favour of the latter. In the short-run, this shift will probably continue. The two most important architects of the rationalized procedures, Pierre Trudeau and Michael Pitfield, are no longer in office. Manifestly, the structure they were influential in creating did not deliver on its heady promises. Among students and practitioners of public administration, there appears to be a declining belief in the possibility or even desirability of proceeding by the more rationalized technologies of decision making and a recognition of the limits of the applied management sciences. And the near defeat of the Trudeau government in 1972 and its ousting from office in 1979 may well have contributed to the shifting balance. Further, in its competition with the provinces for the allegiances of Canadians, the federal government could ill afford to sustain a system which was, or at the very least appeared to be, remote, highly formalized and insensitive to the immediate concerns of citizens.

In terms of recommendations, we would hope that at least the FEDC elements of the 1982 reforms are preserved. There are very real possibilities in this regime for relating the federal apparatus — or at least those crucial parts of it involved in economic development policy — to the needs and interests of particular provinces. There is ample evidence that the general disposition of the structure and operation of the federal government is to de-emphasize values and interests which are spatially delimited and a powerful counterweight is needed. The FEDCs acting in collaboration with regional ministers have the capabilities of providing this counterweight.

We would also recommend that executive careers in the public service be planned so that, upon reaching a senior executive position, an official would have had service both in the field and in the national capital region. The senior ranks of the public service consist much too largely of persons whose experience, perspectives, and ambitions are confined to the ingrown world of Ottawa-Hull. Only through changes to remedy this deficiency will the actual and perceived unresponsiveness of federal officialdom to the provinces and regions be mitigated.

Chapter 6

The House of Commons

This chapter examines the House of Commons as an institution through which regional and local interests are channelled. Those who believe that the House does not fairly represent these interests proceed from two perspectives. The first asserts that the influence of political parties in the Commons is too strong and that MPs unduly subordinate the interests of the regions, provinces and localities from which they come to party interests. There are thus recommendations here to weaken party cohesion. The second perspective argues the need to correct the possible regional imbalances of the parties in the House of Commons. This would remedy a situation, which has existed for prolonged periods in recent years, where both of the major parties are virtually shut out of major regions of the country, even though both draw a significant proportion of the popular vote from their respective regions of weakness. This deficiency can, it is claimed, be remedied by changes in the electoral system.

These two sets of reforms are not mutually exclusive and there would be no logical inconsistency in arguing that the House of Commons could become a more adequately representative institution. Changes could be made to weaken party cohesion and so in part remedy the regional imbalances in the parliamentary composition of the parties. However, the two perspectives are quite distinct. One views the House primarily in terms of the capacity of MPs to represent the interests of the particular constituencies which elect them. The other sees the Commons largely in terms of party groupings.

The Pervasiveness of Party

Both casual impressions and detailed investigations of the House of Commons reveal the pervasiveness of party and the profound disposition of MPs to act together as members of their respective parties. This is most easily measured by party voting on divisions. A study of the first two sessions of the Twenty-Sixth Parliament in 1963 developed an index of cohesion by dividing the total number of MPs of a party voting on divisions by the total number voting with the majority. According to this method, the average cohesiveness on all votes was 96.8 percent; for the parties, the indexes were: Ralliement des Créditistes 100 percent, Liberals 99.9 percent, Conservatives 98.4 percent, New Democrats 97 percent, and Social Credit 92.9 percent.[1] In his study of the same Parliament, Roman March reports that, on 124 divisions, 78.1 percent of MPs had never voted against their parties, and no MP had voted against his or her party more than five times.[2] Although these investigations took place two decades ago, it appears that, unlike their British counterparts, Canadian MPs have shown no recent disposition to break party ranks on divisions.

It is now and again suggested that there be an extension of the number of free votes in the House of Commons in which MPs could and would vote independently of their respective parties. So far, these details have not been spelled out precisely. Under some situations, as in the flag debate during the Twenty-Sixth Parliament and some of the debates on capital punishment, free votes would take place when the government had not taken a stand on an issue, with ministers voting on different sides. If this procedure were extended in a radical fashion, it would directly, and perhaps inappropriately, challenge the operating principle of collective cabinet responsibility. Such a result would put ministers in an invidious position when bills which they had sponsored as heads of departments were defeated by majorities which included some of their cabinet colleagues.

The recommendation that there be an extension of free voting is based on the assumption that the present high levels of party cohesion are the result of the "parliamentary rule," the convention that a government to remain in office must retain the continuing support of a majority of the members of the House. According to this line of argument, this convention provides an overpowering incentive toward cohesion in the party in power because the life of the government depends on such cohesion. To the extent that the largest opposition party seeks to be perceived by the public as a credible alternative government, its members will similarly be disposed towards unity. Yet the parliamentary rule does not dictate that governments are under a constitutional obligation to resign if they are defeated on a great number of issues for which party cohesion is total or almost so. According to convention, a government would be

required to resign if defeated on an explicit vote of confidence or on a budget motion. There is a grey area related to defeats on important government measures where informed and disinterested students of the constitution might well disagree as to whether the government was under an obligation to resign. However, defeat on most divisions in the Commons would not put the government under any constitutional obligation to relinquish office.[3] Yet despite this, most private MPs and members of the government usually act as if most motions involved the continuing tenure of the ministry. Peter Dobell points out that, since the Second World War, there have been no more than six issues for which the government has formally stated that confidence in the government was not at issue in the outcome of the vote.[4]

With such continuous exposure to the U.S. political process, it is understandable that many Canadian exponents of the enhanced independence of MPs are explicitly or implicitly thinking in terms of the independence from party enjoyed by American legislators. Yet because of the American system of separation of powers in which the tenure of the executive does not depend on the continuing support of legislative majorities, this model has little relevance to Canadian circumstances. What is more relevant is the increasing disposition of members of the British House of Commons since the early 1970s to vote independently of their parties. British cabinets have sustained defeat on recorded votes with relative frequency and have not resigned, even though some votes involved important policies of a fiscal nature.[5]

There have been various explanations for the increasing disposition of British MPs to vote independently of their respective parties: the increasing number of a new kind of member with the training and disposition to act independently, the failure of party leaders to be responsive to backbench opinion, the presence in each of the parties of relatively stable ideological positions contrary to the party mainstream, relaxation of the parliamentary rule to allow governments defeated on important measures to continue in office, and the relatively detailed nature of party election manifestos, in which some MPs assert that they are not committed to following the party line on issues on which such manifestos are silent.

In the context of the partisanship permeating the Canadian House of Commons and, to a somewhat lesser extent, its constituent committees, it is useful to make a distinction between party discipline and the self-imposed norms of MPs about appropriate parliamentary conduct. Party discipline relates to the way in which party leaders use sanctions to influence conformity among MPs. Self-imposed norms relate to rules of behaviour among MPs for which there are no sanctions. One can reasonably expect party discipline and the internalized norms to reinforce one another. Unquestionably, prime ministers, their cabinet colleagues and powerful persons in the Prime Minister's Office can deny government

favours to MPs who are perceived to be unduly independent. Rewards offered include cabinet postings, parliamentary assistantships or desirable committee assignments, favourable treatment for the MP's constituency, perhaps some desirable patronage appointment after the member leaves elective office, and so on. The capacity of leaders of the opposition parties to elicit conformity is much more limited but may be enormously enhanced if it is expected that the opposition leader will head the government in the near future.

However, the research of Allan Kornberg on the Twenty-Fifth Parliament indicates that party cohesion is more attributable to self-imposed norms than to the sanctions at the disposal of party leaders.[6] Robert Jackson and Michael Atkinson give this assessment:

> Since Canadians MPs . . . only conceive of politics in terms of parties, they are probably sceptical of the idea that sanctions can be used to manufacture party loyalty. The notion of party is imbedded so deeply in the perceptions of Canadian parliamentarians that little consideration is given to the consequences of independent action.[7]

In a similar vein, Peter Dobell notes that MPs in Canada undoubtedly want to see their role enhanced and to have greater opportunities to contribute to governing the country. But party discipline is by and large perceived to be necessary and helpful rather than an external pressure which they resent, he adds.[8] Therefore, members may be challenged at the local level by provincial politicians of the same party designation but espousing policies that differ from those of the national parties. The members then would find it difficult or impossible to defend the national policies without caucus support.

The high degree of party cohesion in the contemporary Canadian House of Commons can in large part be attributed to the more active role that party caucuses have assumed since the late 1960s. Dobell states, "As long as caucuses operate democratically and political leaders take their caucuses seriously, backbench members in Canada will favour disciplined parties."[9] A study of the caucus system by Paul Thomas presents the only systematic account of the institution on record. He concludes that the government caucus plays an important role in the governing process. Working through regional and then the parliamentary caucuses, individuals MPs can have influence in modifying, delaying or blocking proposed legislation. The general influence of the caucus on spending is generally upward and this body can have an important effect on the allocation of expenditures among regions and subregional areas. Regional caucuses are usually consulted about appointment from their province, he notes.[10]

Thomas points out that "the principal constraints on the government caucus are time and information." Yet within these constraints, private members have an interest in maintaining a vigorous and effective caucus

in which their views are heard and in which these views have some real influence over government policy and ministers. In return, a strong caucus can keep them in touch with grass-roots opinion better than any other institution. The caucuses of the opposition parties have a somewhat different set of rules but in a similar fashion they are useful to both the party leadership and backbench MPs and are also crucial to the sustenance of party cohesion.

Party cohesion in the House of Commons is thus a complex matter. Private members are much less docile than is sometimes supposed. Their usual adherence to the party line is in large part dependent on their conviction that they can exercise a degree of influence over that line. The opening up of the local nominating process has resulted in a situation in which the party leadership has a diminishing capacity to determine which individuals will run for office. On only two recent occasions has the leadership of the parties explicitly denied a local nominee membership in the caucus.[11]

At the top of the party hierarchy, the office of party leadership is a gift of the national convention, in which only three to four percent of convention delegates are MPs. In 1967 and 1983, the Progressive Conservative convention went so far as to depose its leader. With such divergent political bases of leaders and private members, the unity of the parliamentary parties is somewhat of an achievement.

Party cohesion, which results in large part from the effectiveness of the caucus system, has two implications for the responsiveness of the political process in Ottawa to regional interests and values.

First, the operation of the provincial and regional caucuses renders the process more sensitive to the regions than is often supposed. Because the most effective forms of regional advocacy are carried out in relative secrecy, as is the case with the cabinet, the channelling of regional concerns through processes outside public scrutiny makes the political process appear less responsive to regional pressures and interests than in fact it is.

Secondly, caucus influence in the House is unavailable to provinces and regions having few or no elected representatives. Thomas notes that, during the period prior to the 1984 election, party caucuses more resembled contending regional blocs than truly national bodies.[12]

One kind of reform that might give MPs increased opportunities to act independently of their respective parties lies in the strengthening of the committee system. A report of the House of Commons Special Committee on Procedure published in 1968 recommends a significant extension in the functions of standing committees, which the committee hoped would contribute greatly to the more expeditious dispatch of House business and develop areas among MPs of subject specialization. Partly in response to that committee's proposals, there was a major overhaul of the committee system in 1968–69. Despite those changes, it seems that

the confident expectations of the late 1960s in large part remain unfulfilled. In general, partisanship continues to permeate most committee activity. The membership of committees fluctuates. And few MPs show much disposition to giving the sustained attention to subjects of particular concern to themselves or their constituents that is necessary for acquiring a base of specialized knowledge in these matters. Many, perhaps a majority, are not deeply concerned with committee work. They seem to prefer spending their time and energies on service to their constituents, party activities, activities of the House as such and so on.

There are three groups in the House of Commons which have divergent interests in committees. The first includes members of the cabinet. The cabinet is interested in directing the activities of the committees toward facilitating the enactment of the government's legislative program and avoiding embarrassing committee surveillance of the government's activities. The second group consists of members of the opposition parties. While this group has some stake in a system of active committees, its primary focus is on the proceedings of the full House. Proceedings of the House of Commons are in a large sense an opposition "show" and opposition MPs have an interest in not diverting their time and energies to committee work which for the most part goes on without significant publicity. The third group, and the group with the most direct interest in active committees, is composed of backbench MPs of the government party. These members are more active participants in committee work than opposition members. Since the proceedings of the full House are for the most part interactions between ministers and members of the opposition parties, those government MPs who wish to play an active role in policy matters find their opportunities to do so in committee activities. Committee work is in a sense shaped by the conflicting interests of these three groups.

The committee system of the House of Commons is evolving and may in future operate with increased effectiveness. One element of the increasing independence of private members in the British Parliament was the change in 1979 which gave committees power to determine their own agendas and employ staff as required. Dobell concludes that, although the functions and powers of Commons committees have evolved rapidly and they have increased their independence of the executive, they do not exploit the powers they have.[13]

The most promising possibility, which was used to a considerable degree in the last Parliament, is the power to set up task forces to study particular issues. These groups are small and are able to elicit more active participation of their members than have the larger parliamentary committees. They are particularly useful in matters where none of the political parties is explicitly committed on the matters under review. Yet important obstacles remain, and committees are unlikely to play an active role in the Estimates process, as earlier reformers had hoped.

The interests of ministers and opposition members are not completely compatible with those of active and independent committees. Back-bench MPs of the government party have the greatest stake in the committee system, but some may perceive that overly independent conduct in committees may compromise their chances of preferment in the hands of party leaders. Members of Parliament for whom publicity is meat and drink may find few incentives to devote their time and energy to committee activities carried on almost entirely outside the public view and even fewer to acquire the specialized knowledge necessary to be effective in committee activity. Yet the most important obstacle to the effectiveness of the committee system is the partisanship which permeates the committees as well as other dimensions of parliamentary life.

Members of Parliament may also find increased scope for acting independently of party by introducing private members' bills in Parliament. Most private members do on occasion introduce such bills, and the one afternoon each week devoted to such motions gives MPs the opportunity to voice their specific concerns. Yet it is relatively rare for a private member's bill to become law. John Stewart calculates that only 14 private members' acts were enacted between 1945 and 1970. One of the obstacles to private members' legislation is the constitutional provision that all measures for raising and spending public funds must be introduced into the House by a minister. Apart from this obstacle, it is improbable that any considerable number of private members' bills will become law. On the rare occasions they do, the sponsoring MP has usually secured the support of the government for the measure beforehand. However, in recent Parliaments, MPs have had some success in using the time devoted to private members to having their proposals sent to the House of Commons committees for consideration.

In general, then, parties in the House of Commons will likely continue to act in a relatively cohesive way. Despite the wishes of many outside the House that they should act otherwise, both the party leaders and backbench MPs have incentives for party cohesion. Changes to reduce party unity cannot be imposed by changes emanating from outside the Commons. Dobell suggests, however, that it would be desirable if it were more generally recognized by the House of Commons and by the public that the defeat of a government measure in the House does not of itself require the government to resign and the prime minister to request a dissolution. Such a recognition would eliminate some of the posturing which occurs on those rare occasions when a government measure is defeated and would make private MPs of the governing party somewhat more insistent that their concerns be accommodated by the government.[14]

There is in Canada a certain romantic notion of the independent MP taking a stand on issues on the basis of conscience or regional interest. Yet, as in the United States Congress, this means almost by definition

that the legislator need not take into account interests and values other than those dominant in the home constituency. To carry out their duties, former prime minister Robert Stanfield recommends:

> Members of Parliament must join in working out and then supporting the basic policies of their party. Members cannot be merely regional advocates. They must face the national difficulties. Reconciling differences and finding and implementing solutions requires leadership *and* disciplined support. [15]

Changes in the Electoral System

The second major set of reforms involving the House of Commons relates to the electoral system. The electoral system is the procedure by which the preferences of voters for particular parties and candidates are converted into seats in the House of Commons. This is only a part of the national electoral arrangements and excludes such crucial matters relating to the voting process as the registration of persons on the electoral rolls, the periodic redrawing of constituency boundaries, the public regulation of campaign finance, the prohibition by law of certain electoral practices and so on.

Canadians have been remarkably conservative about their federal electoral system. In Canada, unlike the United Kingdom or Australia, there has never been, it seems, a significant national organization devoted to the advancement of proportional representation. In 1924 and 1925, the Canadian government introduced bills to replace the first-past-the-post procedure by alternative voting, but these bills were never enacted. For historical reasons, a small number of dual-member constituencies in which each elector could cast two votes persisted into recent times, but the last of these was eliminated in 1965. Since then, all members of the House of Commons have been elected from single-member districts according to the rule that the candidate with the largest number of votes is elected by majority or plurality. Not only has there been an absence of experimentation with electoral systems at the federal level but also, until the last decade, there has been almost no discussion of electoral reform or of the consequences of the first-past-the-post procedure for the national political system.

The results of the federal general elections of 1972, 1974, 1979 and 1980 raised the issue anew. Serious tensions between Ottawa and the governments of Quebec and of the western provinces for the first time put the reform of the electoral system squarely on the agenda of Canadian political debate. These elections returned a House of Commons having virtually no Liberals from the West and almost no Progressive Conservatives from Quebec. For this reason, many students of Canadian affairs saw the electoral system itself as a cause of national disunity. That has sparked a spate of recent proposals for its reform.

Critiques by Cairns and Irvine

The most able and comprehensive critiques of the first-past-the-post system in federal elections are contained in an article by Alan Cairns published in 1968[16] and a monograph by William Irvine which appeared in 1979.[17]

Cairns's seminal essay provides the intellectual framework for much of the current debate about the Canadian electoral system and continues to be widely quoted. One of his major targets is the then conventional view that the two largest Canadian parties were nationalizing and unifying agencies, that is:

> Canadian politics . . . are politics of moderation, or brokerage politics, which minimize differences, restrain fissiparous tendencies, and thus over time help knit together the diverse interests of a polity weak in integration.[18]

This was, claims Cairns, an overly benign and distorted view of the performance of the parties. Rather, he argues:

> The party system . . . exacerbates the very cleavages it is credited with healing. As a corollary it is suggested that the party system is not simply a reflection of sectionalism, but that sectionalism is also a reflection of the party system.[19]

In concrete terms, he gives several examples of the ways in which the two major parties had exacerbated the relations between the French-speaking community of Quebec and other Canadians.

The thrust of Cairns's analysis is that the aggravation of sectional conflict by the political parties could in large measure be attributed to the electoral system. Thus:

- The imperfections of the political market as decisively shaped by the electoral system give politicians powerful incentives to make appeals to particular sections and thus to exploit intersectional tensions. The system results in regional blocks of seats and encourages those who are seeking election to make appeals to regions.
- The electoral system distorts the sectional composition of the parties in the House of Commons and has a corresponding distorting effect on party policies. Certain provinces and regions are only weakly represented in the caucuses of the parties even though a significant proportion of the voters of these areas have supported such parties. The extra-parliamentary elements of the parties do not have an important influence over party policy, which is determined by the party leader and his senior colleagues in the House of Commons, and which is decisively shaped by the parliamentary composition of the caucus. Thus:

> The significance of the electoral system for party policy is due to its consistent failure to reflect with even rough accuracy the distribution of partisan

support in the various sections/provinces of the country. By making the Conservatives far more of a British and Ontario-based party, the Liberals far more a French and Quebec party, the CCF far more a prairie and BC party, and even Social Credit far more of an Alberta party up to 1953, than the electoral support of these parties "required," they were deprived of intra-party spokesmen proportionate to their electoral support from the sections where they were relatively weak. The relative, or on occasion total, absence of such spokesmen for particular sectional communities seriously affects the image of the parties as national bodies, deprives the party concerned of articulate proponents of particular sectional interests in caucus and in the House, and it can be deductively suggested, renders the members of the parliamentary party personally less sensitive to the interests of the unrepresented sections than they otherwise would be. As a result the general perspectives and policy orientations of a party are likely to be skewed in favour of those interests which, by virtue of strong parliamentary representation, can vigorously assert their claims.[20]

- The electoral system assists minor parties whose electoral strength is concentrated in particular provinces and regions and impedes minor parties with more inclusive support. Thus, in the 1921–65 period which Cairns analyzes, Social Credit was a beneficiary of the system while the CCF/NDP received a smaller proportion of seats than of popular votes.

- The electoral system distorts "perceptions of the polity." Even the most sophisticated scholars have attributed a monolithic quality to party support in particular regions which is not so in terms of the preference of voters. For example, between 1921 and 1965, some 48 percent on the average of voters in Quebec cast their ballots for parties other than Liberal.

- The electoral system encourages political instability, it exacerbates conflicts among sections and it depresses political mobilization and political conflict in other areas. In general:

We can conclude that the capacity of the party system to act as an integrating agency for the sectional communities of Canada is detrimentally affected by the electoral system. The politicians' problem of reconciling sectional particularisms is exacerbated by the system they must work through in their pursuit of power. From one perspective it can be argued that if parties succeed in overcoming sectional divisions they do so in defiance of the electoral system. Conversely, it can be claimed that if parties do not succeed this is because the electoral system has so biased the party system that it is inappropriate to call it a nationalizing agency. It is evident that not only has the electoral system given impetus to sectionalism in terms of party campaigns and policy, but by making all parties more sectional at the level of seats than of votes it complicates the ability of the parties to transcend sectionalism. At various times the electoral system has placed barriers in the way of Conservatives becoming sensitively aware of the special place of Quebec and French Canada in the Canadian polity, aided the Liberals in that

task, inhibited the third parties in the country from becoming aware of the special needs and dispositions of sections other than those represented in the parliamentary party, and frequently inhibited the parliamentary personnel of the major parties from becoming attuned to the sentiments of the citizens of the prairies. The electoral system's support for the political idiosyncracies of Alberta for over two decades ill served the integration of that provincial community into the national political system at a time when it was most needed. In fact, the Alberta case merely illustrates the general proposition that the disintegrating effects of the electoral system are likely to be most pronounced where alienation from the larger political system is most profound. A particular orientation, therefore, has been imparted to Canadian politics which is not inherent in the very nature of the patterns of cleavage and consensus in the society, but results from their interplay with the electoral system.[21]

Cairns insists that his analysis is diagnosis rather than prescription and that in particular "the habituation of Canadians to the existing system renders policy-oriented research on the comparative merit of different electoral systems a fruitless exercise."[22]

Just a little over a decade later, Irvine's monograph appeared. In it, he took up several of the themes raised by Cairns, but did not refrain from analyzing several proposals for electoral reform then current and from making a bold recommendation of his own. The opening sentences of Irvine's study assert that:

Canada's central institutions face a crisis of representation. This has led to a marked lack of legitimacy and hence authority of the federal cabinet, the federal parliament and the federal judiciary. They are less able to carry through the kinds of accommodation necessary if the country is to survive.[23]

Later, he writes:

A large measure of the current alienation from [the] federal government comes from the fact that its formal power exceeds its real social power. Governments act, and must act, on behalf of the whole country but they do not have support from a majority of the voters, nor do they have caucus representation from large segments of the society.[24]

The prescription is to change the electoral system

so that . . . parties [have] both the incentives and the resources to follow certain courses of action, courses which would have beneficial consequences for increasing central authority.[25]

Irvine's own proposal for electoral reform is the most radical of the schemes now under discussion.

Specific Proposals for Electoral Reform

In recent years, there have been several proposals for electoral reform. Their major impulse is to bring the distribution of seats won by each party in the various provinces and regions more into line with the proportion of popular vote cast for each. A number of political writers and study groups have developed alternative methods for distributing seats.

1. Writing after the 1972 election, Paul Fox proposed that voters continue to cast their ballots within the existing constituencies but that after each election seats be distributed within each province on the basis of the respective proportions of the popular vote received by the parties.[26] The party members elected to each party's quota in the province would be those who had the highest proportion of the popular vote in their respective constituencies.

   In his 1973 book *Divide and Con*, Walter Stewart suggested a variant of the Fox proposal according to which each of the parties which had more than 25 percent of the national popular vote in the previous election would have the right to a "protected list" of 30 candidates who would be assured seats even though those persons did not qualify under the provincial quota system of allocating such places.[27] These protected lists — reduced to ten seats for minor parties — would ensure that candidates preferred by the parties would be elected, especially those chosen by the party leaders to be members of the cabinet or shadow cabinet.

2. Ed Broadbent proposed in 1978 that the House of Commons be enlarged by 100 seats, with 20 allocated to each of the five regions.[28] The regional seats would be apportioned among the parties according to their proportion of the regional popular vote and filled from regional lists drawn up by the national parties.

3. The scheme proposed by Irvine in his 1979 monograph was to increase membership in the House of Commons from 282 to 354 while reducing the number of MPs elected from single-member constituencies to 188. The 166 provincial seats would be filled according to the following method:

   Political parties desiring to elect provincial representatives would have to provide the chief electoral officer with eleven lists (one for each jurisdiction) . . . each with a number of names equal to the number of provincial representatives and listed in rank order. On election night, votes would be tabulated in each constituency and the candidate with the highest total would be declared elected from that constituency. So far, there has been no change from current practice. However, the votes for candidates of each recognized party which had submitted provincial lists would be aggregated for the provincial level, and the percentage of distribution of the provincial vote so aggregated would be calculated. The total number of provincial seats (constituency plus provincial representatives) would be multiplied by each

party's percentage of the provincial vote, yielding each party's provincial "entitlement." If the number of constituencies won exceeds the entitlement for any party, no action is taken. All constituencies are represented by their most popular candidate. Where the number of constituency victories is less than the entitlement, sufficient candidates from the party's provincial list are declared elected to make up their entitlement, beginning at the top of the list and skipping over any person already elected from a constituency. As this implies, a candidate could offer himself both in a constituency and on the list.[29]

4. Donald V. Smiley in a paper delivered in 1978 made this proposal:

Voters would cast their ballots as they do now and the same number of MPs would be elected from single member districts. But the House of Commons would be enlarged to include one hundred "provincial" MPs, with Prince Edward Island having one of those and the rest distributed among the other provinces in proportion to their respective populations. The "provincial" members would have the same standing in the House as their other colleagues and be given services in their respective provincial capitals and travel privileges to and from those capitals. The provincial MPs would be chosen by ranking in each province those who had received the highest proportion of popular votes to the winning candidates.[30]

5. The recommendation of the Task Force on Canadian Unity in its 1979 report suggested increasing the membership of the House of Commons by "about 60" with these additional seats "awarded to candidates from ranked lists announced by the parties before election, seats being awarded to parties on the basis of percentages of the popular vote."[31] The Task Force did not make specific proposals for the allocation of the 60 seats, preferring that this decision be left to Parliament in consultation with experts. The report went on to say:

One method would base the allocation of the 60 seats on the basis of the vote in each province won by a party, the additional seats being awarded to those parties which otherwise would be proportionally under-represented. Another method would be to allocate the 60 seats on the percentage of the country-wide vote received by each party and apply what is known as the d'Hondt formula for allocating seats provincially among parties.[32]

6. In a paper presented to the Canadian Political Science Association in 1980, Ronald Landes recommended the addition of 100 "national seats" to the House of Commons.[33] These additional seats would be apportioned on the basis of the parties' national votes, with the proviso that a party would need to win at least 1.5 percent of the national vote before becoming eligible for a share of the national seats. The parties would appoint national MPs after each general election and there would be no provincial or regional constraints on their choices. No person could serve more than two terms as a national member.

7. In their report *Electoral Reform: The Time is Pressing, The Need is Now*, prepared for the Canada West Foundation in 1980, David Elton and Roger Gibbins called for the reduction of single-member constituencies from 282 to 255 and for the addition of 75 new MPs to be elected from party lists in province-wide contests.[34] Voters would be given two ballots, the first as now would be for the election of the constituency MP, the second to allow the voter to choose the party list of their choice. The 75 provincial MPs would be allocated to the parties on the basis of their respective proportions of the provincial popular vote. These MPs would be allocated among provinces on the basis of a population formula giving Prince Edward Island one seat and Ontario and Quebec 15 each.

8. Indira Singh in her 1982 MA thesis proposed that 50 seats be added to the present 282 single-member constituencies.[35] This number of additional seats would remain constant despite any future changes in the number of single-member ridings. A party would need to receive at least 6 percent of the "enumerated national electorate" to qualify for any of the 50 national seats. The MPs for national seats would be chosen according to rank from lists provided by each party before the election. These seats would be distributed among the parties in each province using the d'Hondt remainder formula. No person would be allowed more than two terms as a national MP.

A Critique of the Electoral Reformers

It is not the purpose here to make a detailed critique of each of the schemes for electoral reform outlined in the previous sections. Such an examination would require a study of how parties and voters would respond to these proposed electoral systems. Irvine and Singh have simulated the results in terms of the party membership of the House of Commons, had several of these proposals been in effect in recent federal elections. Yet these simulations are of questionable usefulness because they are based on the assumption that voters would have been uninfluenced by the electoral system in registering their preferences. To the contrary, one of the major purposes of electoral reform is to give voters and parties other incentives than those which now prevail.

Can anything be said in defence of the electoral system by which members of the House of Commons are now chosen? It has the very considerable advantage of being simple and familiar to Canadians. Those who have supported this system in preference to one variant or other of proportional representation have asserted that it contributes to government stability. However, in six of the ten general elections between 1957 and 1980, no party received a majority in the House of Commons. A generation ago, it was the conventional wisdom, based largely on the interwar experience of several European nations, that the

proportional representation system inevitably resulted in a proliferation of parties and hence government instability. While later experience has shown a certain relationship between the number of parties in a political system and its electoral system, proportional representation has also been found to coexist with a relatively small number of parties, as in Eire and the Federal Republic of Germany. Yet, if the electoral system is to be a "mirror of the nation's mind" in translating the preferences of voters into the partisan composition of the legislative body which they elect, the results of the first-past-the-post system have surely been indefensible.

- In only two of the 19 general elections between 1921 and 1980 — namely, 1940 and 1958 — has the party returned to government received more than half of the popular vote, although in 11 of these elections a majority government was elected.
- The system is persistently disposed toward the party with the largest number of popular votes or to a party whose strength is concentrated in particular regions, and against second and minor parties whose voting strength is dispersed.
- Slight shifts in votes may be translated into decisive majorities. For example, between the 1926 and 1930 general elections, the Conservatives increased their popular vote from 45.3 percent to 48.8 percent but their standing in the House went from 91 seats to 137 seats, and they formed a majority government.
- The system awards regional blocks of seats out of proportion to the popular standing of parties in particular regions and denies any effective electoral strength in other provinces and regions, even though a party may have won a significant proportion of the popular vote.

In a perceptive critique of the electoral reformers, John Courtney suggests that the present system sometimes has results that are not altogether unfortunate.[36] He focusses on the election of 1979 after which the Liberal government resigned, even though it had more votes but fewer seats than its Conservative opponents. Courtney suggests that had another electoral system been in effect, perhaps one based on proportional representation, the Liberal leaders might have decided to meet the newly elected House of Commons. And because the Liberals have a record of relative success in operating minority governments under King, Pearson and Trudeau, they might have been sustained. Courtney suggests that, with their combined advantages of electoral support and superior capacity in working minority governments, the Liberals might have been difficult to displace if a different system had been in place in 1957 and 1979 when they suffered narrow defeats at the polls. He advances this more general argument:

Neither the number of seats nor the percentage of votes (or, for that matter, the two together) in isolation from a whole host of other variables should be

expected to resolve the question of which party, or which coalition of parties, should form the government. Normally the question never arises. But when it does, no matter which electoral system is used, the outcome and the fairness of an election would have to be judged in relation to a number of practical political variables. What were the parliamentary and electoral strengths of the parties at the time of the preceding election? What was the composition of Parliament at dissolution? What issues and policies tended to distinguish the parties from one another during the campaign and capture the interest of the voters? What will be the probable voting alliances between and among the parties once Parliament gets under way? These questions, and others, suggest that post-election decisions call for informed political judgment.[37]

One of the central propositions of Cairns and Irvine is that the regional representation by parties in the House of Commons, as decisively shaped by the electoral system, is the crucial determinant of the sensitivity of parties to regional interests. Cairns states that groups not elected to Parliament have little influence over party policy and that

> . . . the general perspectives and policy orientations of a party are likely to be skewed in favour of those interests which, by virtue of strong parliamentary representation, can vigorously assert their claims.[38]

This bias is cumulative:

> To take the case of the Conservative party, the thesis is that not only does the electoral system make the party less French by depriving it of French representation as such, but also by the effect that the absence of French colleagues has on the possibility that its non-French members will shed their parochial perspectives through intra-party contacts with French co-workers in Parliament.[39]

Further, some situations require parties to make a choice between sections and, in such circumstances, they can be expected to sacrifice interests in sections where they are weak. This situation would reinforce this weakness in the future.

Irvine repeats the argument. In speaking of the Liberals and the West, he writes:

> Prime Minister Trudeau has managed to appear particularly unconcerned about things that affect life in the west. . . . The problem is not solely one of personality. Insensitivity could be much reduced by a large contingent of colleagues who do reflect the views and feelings of the various parts of the country and who would make it their business to communicate these to the rest of the party, and, in particular, to the party leadership.[40]

More generally:

> The fact that votes are not translated into seats . . . makes it inevitable that all parties will be needlessly insensitive to certain currents of feeling — needless, literally, because the views could have been present within the party but for that operation of the electoral system.[41]

But to what degree do the policies enunciated by party leaders on particular regional issues reflect the input of their regional caucuses in the House of Commons? In the light of the study by Thomas, it would be imprudent to deny the importance of these regional balances. Yet there are other influences involved. Thomas concludes that:

> Size [of the regional caucus within the national caucus] is obviously important, but it is not the determining factor in most cases of inter-regional conflict. There is a sensitivity within all parties to pay heed to legitimate regional concerns. The quality of regional spokesmen is very important. A regional caucus can enjoy influence disproportionate to its size if its members are experienced, knowledgeable, articulate, persistent and persuasive in influencing party leaders. As a former MP stated:
>
>> This numbers business is a mirage. I think Jack Pickersgill was worth 30 members from his region. Today, I think Allan MacEachen is worth 40 members. It is the quality of the people you send, not just send them once but send them back again and again so that they become key people.[42]

There are other influences, of course. These may come from the bureaucracy as well as from regional and other interests allied with particular departments and agencies. The party leader's personal preferences also have enormous weight in forming party policy; in recent years, party leaders have had enormous control over the party stance in the crucial area of French-English relations. In fact, fragmentary evidence about these relations raises the question of whether parliamentary caucuses have any real input into language policy formation.

- Even after the general election of 1958 in which the Progressive Conservatives won 50 of the 75 Quebec seats, the Diefenbaker government was somewhat insensitive to the interests of francophone Quebec. Indicating this insensitivity was the fact that only one francophone Quebecker was appointed to an important cabinet portfolio — namely, Leon Balcer to Transport between October 1960 and his resignation in April 1963.
- In the air traffic controllers' dispute of 1976, the Liberal government yielded to the airline pilots and English-speaking controllers, even though nearly half the government's caucus representation consisted of francophone Quebeckers, many of whom lobbied aggressively on behalf of their French-speaking compatriots, and a senior Quebec cabinet minister resigned from the government in protest against its stand on the issue.[43] Interestingly, the matter was resolved generally in favour of francophone interests after a commission of enquiry under the Clark government, which had little representation in the House of Commons from Quebec.
- Although only two Progressive Conservative MPs were elected from Quebec in the general election of 1979, the incoming prime minister proved remarkably responsive to francophone sensitivities. Both MPs

as well as two francophone senators were appointed to the cabinet. With a good deal of publicity, Marcel Masse was appointed Clerk of the Privy Council. Several key positions in the Prime Minister's Office were filled by francophones, and every ministry was directed by Mr. Clark to fill at least one position on its political staff with a francophone.

The Cairns-Irvine analysis suggests that the regional sensitivity of a national party is almost a mechanical result of the regional composition of its Commons caucus. However, the relative insensitivity of the Liberals to western interests in the first Trudeau government occurred despite that party's hold on 27 of the region's 68 seats in the 1968 election. David Smith in his study attributes the decline of the Liberals in the Prairies largely to the efforts of Toronto reformers both before and after 1968 to refashion the extra-parliamentary elements of the Liberal party.[44] Although in this particular circumstance the lack of rapport between the Liberals and western interests may to a significant degree be attributed to the virtual absence of Liberal MPs from that region since the general election of 1972, the claim of Cairns and Irvine that party policies will almost inevitably be weighted in favour of the regions in which the parties are electorally dominant appears to overstate the case.

Courtney argues perceptively that electoral reformers, in being preoccupied with the electoral system and the regional imbalances encouraged by it, have neglected other representational dimensions.

> Certainly it has not yet been established in the literature that the electoral system warrants such crucial analysis *in isolation from* or, indeed, *at the expense of* other representational concerns which in themselves may be more crucial to the healthy operation of the Canadian polity than a reformed electoral system.[45]

For example, although the short-lived Clark government had only two seats from Quebec, no crisis in English-French relations arose as a consequence. Whether the Progressive Conservatives would have continued to be so successful during the time of the Quebec referendum on sovereignty/association which occurred shortly after their defeat remains a matter of speculation. Courtney asks whether the incoming prime minister took action in filling cabinet and other influential posts to

> ensure that some form of representation was forthcoming whereby Quebecers would justifiably conclude that even though they lacked actual representation on the government side of the House, they had been accorded virtual representation in the government itself?[46]

More generally:

> To single out the electoral system for exclusive attention at the expense of other topics potentially more relevant to representation in Canada would be

a mistake. Further debates over the electoral system will be incomplete if they fail to take into account the wider context within which representation occurs. It would be helpful to know, for example, what Canadians see as the appropriate representational mix among their electoral system, provincial governments, federal bureaucracy, lobbies, and the party system. As the power and authority of government bureaucracies, provinces and professional and economic pressure groups have grown in recent years, have these institutions come to play such a large representational role in the life of Canadians that the typical voter is less concerned with the complexion of federal party caucuses and cabinets as representational institutions than the reformers have implied?[47]

Courtney's point is well taken. Electoral reformers have somewhat overestimated the extent to which the electoral system determines the overall representation of cultural and regional groups, overlooking other central government mechanisms, and so have claimed more for their projected changes than could perhaps be realized.

Issues in Electoral Reform

Incentives

One of the objectives of electoral reform is to spur the major parties to strengthen their standing in regions where their voter appeal is weak. With increased electoral payoffs, parties would be encouraged:

- to design policies that promote interests of regions where they are weak;
- to allocate scarce organizational, financial and other resources to parts of the country where they now get little effective electoral support; and
- to offer more attractive opportunities for able and ambitious people in such provinces or regions.

The behaviour of the parties in allocating resources among the provinces and regions of Canada has been little investigated. It appears, however, that neither the Liberals nor the Progressive Conservatives have recently adopted a straightforward seat-maximizing strategy. If they had, only minimal resources would have been spent by the Liberals in the West, and by the Progressive Conservatives in Quebec, at least prior to 1984. Yet this did not happen. In the 1979 general election, for example, the average spent by Liberal candidates in Alberta was 65 percent of that permitted by law compared with 80 percent by all Liberal candidates on a national basis. The Progressive Conservatives spent 65 percent of the statutory limit in Quebec and 78 percent nationally.[48] By contrast, the NDP with a much more discriminating kind of allocation policy in 1979 spent 48 percent of the amount permitted by law in

Ontario, 50 percent in Manitoba, 67 percent in British Columbia and 81 percent in Saskatchewan. This compares with 35 percent nationally, 4 percent in Quebec and 9 percent in New Brunswick.

The simple, if not simple-minded, reason behind such a broad spending policy is the public-spirited impulse of campaign organizers to make their parties more genuinely national. Alternatively, they may well believe that token spending in weak areas would damage the parties' image in areas where they are strong.

Introducing proportional representation and eliminating distortions caused by the first-past-the-post system may encourage the major parties to become more genuinely national. Courtney suggests, however, that some proposals for proportional representation — presumably most of the "topping up" schemes — may have the opposite result. The parties might see in proportional representation a need to aggressively contest seats in regions where they are already dominant. For example, the federal Liberals in Quebec have at times mobilized supporters even in ridings where there was in effect no contest. With increased electoral rewards, there would be incentives to spend campaign resources on one-sided contests in hopes of strengthening overall provincial standing. Conversely, in areas where parties are weak, they may make even less effort to boost their popular vote, relying instead on proportional representation to give them at least some representation in the House of Commons. Thus the changes would become substitutes rather than incentives for building effective organizations in all provinces and regions. While this is an interesting conjecture, examples elsewhere have not in fact displayed such trends.

Indeed, the electoral system explains only part of the behaviour of national parties toward the provinces and regions. The Progressive Conservatives in Quebec and the Liberals in the West lost effective electoral support for reasons unrelated to the first-past-the-post procedure, although this procedure may have reinforced their weaknesses. While electoral reform may assist the Liberals in rebuilding genuinely national strength, it will not be a substitute for hard work.

Nomination of Candidates

Most of the schemes for electoral reform now under discussion suggest some variant of selecting MPs by proportional representation from party lists. With the loosening of ties between the federal and provincial wings of the parties — most evident among the Liberals, less so among the Progressive Conservatives and NDP[49] — nominating in future may be conducted under federal, not provincial, auspices.

Weakening party cohesion in the House may strengthen effective representation of local and regional interests, especially in constituencies having a large measure of autonomy in nominating candidates.[50]

Under a system of proportional representation using party lists, the national party executive would reward candidates for their loyalty and reliability by placing their names high on the list to virtually assure their election. Conversely, candidates expressing independent views and advancing the interests of their localities would be punished by the executive by giving them a low rank on the list.

The single transferable vote system of proportional representation appears on the surface to contain more possibilities for candidates to act independently of their party. Under the list system, it is the voters who establish the ranking of the candidates on the ballot by indicating their preferences in numerical order. A candidate who wins a certain quota of votes, determined by dividing the number of valid ballots cast by the number of seats at stake plus one, is declared elected. Successive counts are then made to distribute the vote going to candidates receiving lower preferences until all the seats at stake are filled. In this way, party control of nominating and election is considerably reduced.

Australia prior to 1984[51] and Eire[52] use this method for electing members to the Senate and the Dail, respectively. Their experiences indicate that results in Canada might not be very different from the party list procedure, so far as party control is concerned. In these countries, party designations were not at first permitted on the ballot paper, although Australia now permits parties to group their candidates on the ballot, while Eire since 1965 lists candidates in alphabetical order with party designations. In Australia, electors must rank all candidates in order of their preferences or invalidate the ballot. (In the 1983 elections for 10 senators from New South Wales, there were no fewer than 62 of them!) In Eire, voters may either plump for one candidate or rank as many candidates as they choose. The major parties in Australia for Senate elections nominate fewer candidates than the number of seats at stake, while those in Eire nominate the same number of candidates as there are seats in multiple ridings. The Australian parties rank their candidates and advise voters to follow this order, while the Eire parties do not. In both nations, most voters follow the party leads in ranking candidates, although cross-party voting is more common in Eire, perhaps largely because of the smaller constituencies.

Following the party lead may well become the experience in Canada also, if this system were adopted. Consequently, the likelihood for independent action by MPs would probably be diminished as the party leadership gained control of the nominating process, as in Australia and Eire.

Party Proliferation and Coalition

The impact of the electoral system on the number of parties existing within a political jurisdiction is complex. Former fears that proportional

representation would lead directly to party proliferation have been allayed.[53] Interestingly, despite operating under different electoral systems, several of the western democracies (Canada, Eire, the United Kingdom, the Federal Republic of Germany and Australia) exhibit what has been called in Canada the "two-and-a-half party system" with two major parties and a relatively stable minor one. In the Canadian case, it is impossible to do more than make the most tentative conjectures about the impact of electoral changes on the popular vote or the possible emergence of new parties, making coalition governments more likely in future. Because the NDP is so very much handicapped by the present electoral system, adoption of almost any variant of proportional representation would boost its House standing and make majority governments less likely. Even parties with no national affiliations, such as the Parti Québécois and the Social Credit party of British Columbia may be encouraged to throw their considerable resources behind candidates or parties representing purely provincial interests. The response, if any, of those or other parties to such incentives remains conjectural.

Irvine offers considerable detail for assessing the possible consequences of his plan for electoral reform on the Canadian party system.[54] He suggests a "long-run possibility" that the strength of the two major parties "would settle down in the 25 percent range" of the Canada-wide popular vote.[55] The Liberal and Progressive Conservative caucuses would be heterogeneous because each would have MPs from all parts of the country. Because a government could not be sustained without the support of at least two political parties, Irvine visualizes a system of coalitions with open bargaining between parties. He conjectures that the House of Commons would be more responsive to both regional and class interests:

> In addition to cleavages organized around culture and region, class cleavages would be more prominently represented in Parliament, as the NDP would be strengthened and it would be a potent form in government formation. If specific regionalist parties did emerge, regional interests would find they had more political options than they now have. Quebec interests could continue to back Liberals, or back a Quebec party which might enter governments with the Progressive Conservative party. Prairie interests could continue to back the PCs or to support parties that would be negotiating with other political forces. In either the "new-party" or the "no-new-party" outcome, there would be many more potential governing combinations. While this might mean delay in settling on any one of them and would enhance the vulnerability of that one to subsequent enticement of one of its members by other groups, the new parliaments would allow much more innovative response, at least initially, than seems possible under the present system.[56]

There are other possible scenarios besides the one Irvine postulates. For example, even if the major parties sustained declines both in the propor-

tion of popular votes and in seats in the House of Commons because of changes in the electoral system, one or other of these parties might prove capable of governing for significant periods of time without entering into formal coalitions. Liberal minority governments were sustained during 1926–30, 1963–68, and 1972–74, when they showed some capacity to cooperate with parliamentary groups on the party's left. The Progressive Conservatives during 1962–63 and 1979 demonstrated less ability to collaborate with Social Credit. Minority governments could in future be sustained by regional parties. Irvine meets the frequent criticism that proportional representation would encourage extremist or anti-system parties by suggesting that the demands of coalition membership would induce smaller parties to be moderate. However, he does not mention that there would be no corresponding influences toward moderation on parties representing only the interests of regions or other specific interests or ideologies.

Irvine somewhat overestimates the ability of governments to form coalitions. Several of the western European democracies and Australia indeed have governments consisting of members from more than one party, where legislative programs are bargained openly to form a coalition. Canada, after all, has had only one experience with coalition at the federal level — the Union government formed in 1917. The research of John English demonstrates that Prime Minister Borden sought to transcend regional and other particular interests that had supported the traditional party system.[57] Coalitions create difficult situations for parties at the local level. Local organizations may atrophy, as seems to have happened under the Union government and under the Liberal-Conservative coalition which governed British Columbia between 1941 and 1952. Alternatively, local organizations may sustain enormous losses as parties bargain over which constituencies are to be contested by each of the coalition partners, as Britain's Liberal–Social Democratic Alliance recently learned. Furthermore, the coalition situation would require radical changes in the behaviour of the legislative parties. While Irvine's scenario may be plausible in part, there are more obstacles to its realization than he suggests. For example, before a coalition situation could come into being, there would have to be an intervening period of several short-term minority governments and several general elections.

A Possible New Electoral System for Canada

After reviewing a variety of alternatives, we conclude that a new electoral system for the House of Commons should include:

- a single transferable vote procedure of proportional representation for electing MPs from the larger urban areas; and
- an alternative vote procedure for choosing MPs from other areas such that, if no candidate receives more than half of the first preferences,

the lowest candidates are dropped sequentially and the voters' second preferences are distributed to others, until one candidate receives an absolute majority.

According to our plan, the smallest of the urban ridings would have five members. Without devising criteria to guide future electoral boundaries commissions, it is impossible to make an accurate assessment of the total number of MPs to be elected from these. Perhaps 100 to 120 urban ridings would be so established.

The major objectives of our proposed electoral system are to make the House of Commons more effectively representative of territorially based values and interests and to give political parties more incentives than they now have to build support in areas where they are weak. However, we would expect other benefits from these reforms as well, for example, an enhanced representation of women and other groups now relatively under-represented in the Commons.

The larger metropolitan areas also have interests which do not now find an adequate outlet in the political processes of the national government. Some of these interests are specific to particular cities, while others are the concerns of the larger urban agglomerations as such. More than six decades ago, the American political theorist George Sabine attributed the decline of legislatures in large part to the circumstance that the boundaries of legislative districts had ceased to delineate those of communities.[58] Federalism is based on the protection of spatially demarcated values and interests. Yet the only institutions that perform effectively with territorial protection in Canada are provinces, and the provincial governments have been highly successful in frustrating the aspirations of municipal leaders in national politics. We agree with the centralist intrastate reformers that the provincial administrations unduly dominate territorial interests; hence, electing MPs to represent Metropolitan Toronto or Greater Vancouver and so on would aid in righting this deficiency.

Two other beneficial results related directly to the aims of intrastate reform would be furthered by such a scheme. Difficulty in predicting how voters and parties would respond to the incentives limits evaluation of their effect. But a somewhat closer congruence between the party standings in the House of Commons and their proportion of the national popular vote seems likely. Any variant of proportional representation could be expected to achieve this effect. Moreover, the parties would probably become more genuinely national as a result. Although the current government party has seats in every region and province, only the future will tell whether the regional imbalances of previous decades will recur. However, along with a regionally comprehensive government party, broadly based minority parties would also be desirable.

Other likely results from such electoral changes would be beneficial though not directly related to intrastate federalism. Women and other

under-represented groups would gain fuller representation in the House of Commons as parties sought to balance the tickets to broaden voter appeal in multi-member constituencies. As urban areas with multi-member constituencies developed relatively safe seats, the party leaders would regain a larger capacity to attract able and ambitious persons to federal politics on the reasonable assurances that they would be nominated and elected. The present volatility of the nominating process in some ridings makes this almost impossible.

The alternative vote procedure we recommend for the single-member ridings outside the larger urban areas gives voters an extra dimension of choice they do not have now. In the 1980 general election, 137 or 45 percent of MPs were elected with fewer than half the votes in their respective ridings; if, however, Quebec and Alberta are exempted, then some 134, or 72 percent, were elected by a minority of the popular vote. The procedure is simple and we can see no compelling reasons against giving electors an extended opportunity to register their preferences by its adoption. However, in the context of the present study, it is necessary to defend proposed reforms largely with references to intrastate objectives.

We see some possibilities in the alternative vote procedure for moderating inter-regional and French-English conflict. Where three parties seriously contested a constituency under this system, it would be rational for the leading two not to alienate the supporters of the third, assuming the dominant parties could correctly evaluate the relative strength of their opponents. For example, in British Columbia in the 1980 federal general election, the Liberals placed third in 19 of the 25 ridings won by candidates with less than a majority of the popular vote. If the system had been in effect, the Conservative and NDP candidates might have chosen to dampen their criticism of the Liberal national leader in making overtures to Liberal supporters for their alternative vote. Similarly, in Quebec during the period when the Créditistes were the second party in federal politics, the Liberals might have softened their criticism that Conservatives were irretrievably hostile to francophone interests in order to garner Conservative alternative vote support.

In offering these changes for consideration, we retain the conviction that the contribution of the existing system to inter-regional and French-English conflict has been exaggerated while the claims about the restorative effects of electoral system changes have been correspondingly exaggerated. We are also more tentative than are such scholars as Irvine in judging how parties and voters would respond to new electoral incentives. With these caveats, we believe that our suggestions would contribute to legitimate intrastate and other objectives.

The Reform of the Second Chamber

All the recent schemes for giving the Canadian Constitution a greater intrastate direction stress replacing the Senate with a body more effective in articulating provincial and regional interest. The late 1970s heard much discussion of establishing a body like the Bundesrat of the Federal Republic of Germany, composed of persons appointed by and taking their instructions from the provincial governments. More recently, attention has shifted to recommendations for a Senate whose members are directly elected by the Canadian people.

This chapter examines critically both these kinds of change. Attention is also given to how an appointed Senate could become more effective. Whatever one's preferences about a second chamber, it is obviously no easy matter to win the necessary assent for radical changes. The 1982 amending formula requires the consent of the Parliament of Canada with the Senate having only a 180-day suspensory veto, as well as the agreement of the legislatures of seven provinces having in aggregate half the Canadian population. It would be imprudent to regard such changes as possible, particularly if reform of the second chamber were a part of a larger package of constitutional changes. However, there are some considerable possibilities for Senate reform without the need for constitutional amendment or with constitutional amendments that can be effected without provincial consent.

The Senate and Sectional Interests

Contemporary constitutional debate in Canada is little disposed towards either a careful examination of the performance of the existing Senate or of how that body might be reformed short of drastic alterations. The

accepted reason for a second chamber in the Parliament of Canada is to protect provincial and regional interests. However, many believe that the Senate is inherently and irretrievably incapable of performing this role effectively because its members are appointed by the Governor-in-Council, in effect by the prime minister.

It is frequently said in the current discussion that the Fathers of Confederation conceived the Senate primarily as a protector of the provinces and regions of the proposed Dominion. As happened at the Philadelphia Convention of 1787 and in the negotiations leading to the Constitution of the Commonwealth of Australia in the last decade of the nineteenth century, the British North American leaders in 1864–67 found that matters concerning the second chamber of the national legislature gave rise to the most intractable issues. Six of the 14 days of the Quebec Conference of 1864 were given over to these issues. Interestingly, the Fathers explicitly rejected the two proposals for a second chamber now most prominent in the Canadian constitutional debate. These were that the body be directly elected by the people or, alternatively, that it be chosen by the political authorities of the provinces.

From 1856 onward, members of the Legislative Council of the United Province of Canada had been chosen by popular election, although, at the time of the Confederation negotiations, about half of the members of the Council had been appointed under the pre-1856 provisions. Robert A. MacKay writes of the decision against an elected Senate for the new Dominion:

> Popular election as a method of constituting the upper chamber would have been more effective [than appointment by the Governor-in-Council] from the standpoint of representation [of the provinces] but it was dropped in the Quebec Conference with little opposition except from Prince Edward Island. The chief objections to it were that it tended to create two houses of exactly the same character which were both likely to consider themselves the interpreters of the popular will, and that such a condition would inevitably lead to conflicts between the two houses.[1]

With the example of the U.S. Constitution before them, the Fathers rejected the choice of senators being appointed by the provincial governments or legislatures. Further, there was a decisive rejection of the Prince Edward Island proposal that the American example of the equal representation of the provinces be adopted.

A plausible case can be made that the intentions of the Fathers of Confederation, even if they could be definitively discovered, have no direct relevance in determining what the present generation of Canadians in considerably different conditions should do about reconstituting the Senate or otherwise changing our constitutional arrangements. Yet a minimum regard for historical accuracy should caution against buttressing proposals for reform by an erroneous account of what happened in

1864 to 1867. The units by which Canadians were to have equal representation in the Senate were not composed of provinces but, in the language of the day, "sections" — namely, the Maritimes, Quebec and Ontario. Section 23 of the British North America Act specified that senators from Quebec should either be resident or owners of $4,000 worth of property in one of the 24 electoral divisions into which the province was divided. This was an attempt to ensure that there would be some representation of the Quebec English-speaking community in the second chamber. The Fathers were not democrats and the property qualification for senators was an attempt to ensure the privileges of property against popular majorities in the House of Commons. After reviewing avenues for protection of provincial and regional interests following Confederation, MacKay notes:

> It is clear that the Fathers of Confederation did not expect that the Senate would be the chief line of defence for the protection of provincial or sectional rights. The first great check on the central government would be in the federal nature of the Cabinet; the upper house would be only a last means of defence.[2]

A somewhat different view has been put forward by the Supreme Court of Canada in the *Senate Reference* of 1980. The matter at issue was whether the Parliament of Canada had the legal competence to amend the constitution in the direction of changing the powers of the Senate and/or the ways in which its members were chosen. Making an uncharacteristically broad use of the history of the British North America Act of 1867, the Court concluded:

> It is not open to Parliament to make alterations which would affect the fundamental features or essential characteristics given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process.
> The character of the Senate was determined by the British Parliament in response to the proposals submitted by the three provinces in order to meet the he Act, to which a legislative role was given by s. 91. In our opinion, its fundamental character cannot be altered by the Parliament of Canada and s. 91(1) does not give that power.[3]

The Constitution Act, 1982 in one sense reaffirms the constitutional role of the Senate as the protector of provincial interests by providing in section 42(1)(b) that the "powers of the Senate and the method of selecting Senators" can be changed not by Parliament alone but by an amending procedure requiring the consent of the legislatures of two-thirds of the provinces which comprise at least half of the population of all the provinces.

Whatever the intentions of the Fathers of Confederation, the Senate has been relatively ineffectual as a protector of interests which are specifically regional or provincial. MacKay writes:

> The Senate . . . has rarely been appealed to as the champion of provincial or sectional rights and, even when appealed to, it has not consistently supported claims to such rights.[4]

Certainly the governments of the provinces have not regarded and do not regard the Senate as an important channel through which provincial powers are pressed. In effect, the balance of provincial and sectional representation in that body is altered only when the prime minister fails for long periods of time to make Senate appointments.[5] F.A. Kunz in his analysis of the Senate between 1925 and 1963 makes this mildly positive assessment of the body's role in protecting provincial rights:

> In actual practice the Senate has not been so much a bulwark against an unidentified foe, as an additional line of representation of provincial or sectional interests. Through its revisory work, its committees and its debates, reminding the Government of some failure or shortcoming, it has been a distinguished spokesman of the component parts of Canadian federalism. Thus, what the Senate may have lost in drama as a "citadel of provincial rights," it has regained in constructive effort as an auxiliary protector of the provinces in Parliament.[6]

Contemporary debate about changes in the second chamber of Parliament is preoccupied with regional representation. Roger Gibbins writes, "The objectives of Senate reform cluster around a single core, that of enhancing the quality of regional representation within national political institutions by national politicians."[7] He goes on to delineate the more specific objectives of such reforms.

a) to foster the effectiveness of territorial checks and balances within the national legislative process;
b) to improve the political legitimacy and authority of the national government in disaffected regions of the country;
c) to enhance the visibility of regional representation in Ottawa;
d) to enhance the regional sensitivities of federal Crown corporations and regulatory agencies;
e) to promote the mobility of provincial politicians into national politics;
f) to reduce the intensity of intergovernmental conflict by replacing provincial governments with the Senate as the primary vehicle of regional representation within the political process;
g) to sharpen the distinction between the regional interests of regional electorates and the governmental interests of provincial governments.[8]

There are other legitimate roles for a Canadian second chamber besides the protection of regionally specific values and interests. One particular way is as a house of review, as argued later in this chapter. However, Gibbins is quite accurate in his assertion that regional representation has almost totally dominated the current debate.

A Second Chamber of Provincial Delegates

There have been several recent proposals for replacing the existing Senate with a body composed of delegates of the provinces, similar to the Bundesrat in the Federal Republic of Germany. The earliest such proposal for Canada is contained in an article by Peyton Lyon published in 1962[9] and based on his observations while he was in Germany as a member of the Department of External Affairs. Articles by Donald Briggs and Ronald Watts both in 1970[10] and Ronald Burns in 1973[11] also proposed a Bundesrat-type solution for Canada. More recently, such solutions are recommended by the government of British Columbia,[12] the Committee on the Constitution of the Canadian Bar Association,[13] the Task Force on Canadian Unity,[14] the Constitutional Committee of the Quebec Liberal Party,[15] the Ontario Advisory Committee on Confederation[16] and the government of Alberta.[17] Thus, until proposals for a popularly elected Senate emerged in the early 1980s, the suggestion that Canada establish a Bundesrat-type second chamber was almost unchallenged among plans for replacing the existing Senate.

This section analyzes critically the two most carefully argued of the proposals, that of the government of British Columbia and of the so-called Beige Paper of the Quebec Liberal Party.

These are the essential elements of the British Columbia plan.

1. The Senate should be composed of an equal number of delegates from the five regions of Canada — namely, the Atlantic, Quebec, Ontario, Prairies and Pacific regions.
2. Senators should be appointed and directed by the provincial governments. The "leading senator" from each province would be a provincial cabinet minister but there would not be any restriction on the provincial governments in appointing other senators.
3. On delineated groups of matters, the Senate would have a veto which could not be overridden by the House of Commons. The senator who was a provincial cabinet minister would cast a bloc vote for that province on issues concerning:
   a) appointments to the Supreme Court of Canada;
   b) appointments to the major Crown agencies and administrative tribunals and regulatory commissions such as the Bank of Canada, the Canadian Broadcasting Corporation, the Canadian Transport Commission, and the Canadian Radio-television and Telecommunications Commission;
   c) federal laws administered by the provinces, especially the criminal code;
   d) most amendments to the Constitution;
   e) the ratification of a declaration of the House of Commons related to the declaratory power; and

  f) approval of the exercise of the federal government's spending power in areas of provincial jurisdiction.

4. With respect to matters where the Senate did not have an absolute veto, that body would have a suspensive veto which could be overridden by the House of Commons in passing the same law again at its next session or after the lapse of three months, whichever comes first. All senators could act as free agents not under instructions from the provincial governments on matters where the Senate had only a suspensive veto.

  The Beige Paper proposes that the Senate be abolished. An intergovernmental body, which would not be a legislative assembly and designated as the Federal Council, would be established in its stead. These are the major elements of the scheme.

1. The Federal Council would be composed of delegations from the provinces acting under the instructions of their respective provincial governments. The premier of the province or his representative would be head of each provincial delegation which would cast a provincial bloc vote. The federal government might be represented by delegates who would not have voting rights.

2. The size of the provincial delegations would be proportionate to their respective populations with the reservation that Quebec would be guaranteed at least 25 percent of the membership of the Council.

3. Council ratification would be necessary for:
  a) the exercise of the federal emergency power;
  b) the exercise of the federal spending power in fields of provincial jurisdiction;
  c) the intergovernmental delegation of legislative powers;
  d) treaties concluded by the federal government in fields of provincial jurisdiction;
  e) international and interprovincial marketing programs of agricultural products;
  f) the appointment of members of the Supreme Court of Canada and its Chief Justice; and
  g) the appointment of the presidents and chief executive officers of such bodies as the National Energy Board, the Canadian National Railway and Air Canada.

4. The Federal Council would advise the governments on:
  a) the monetary, budgetary and fiscal policies of the federal government;
  b) mechanisms and operating formulas used for equalization; and
  c) in general, on all matters having in its opinion, substantial regional or provincial impact.

5. A "dualist committee" of the Council would be established with the power to ratify or advise on actions of the federal government related to French-English duality. This permanent committee would be com-

posed of an equal number of English-speaking and French-speaking members with about 80 percent of the latter coming from Quebec. The Federal Council's dualist committee would exercise:

the power of ratification of federal laws and other initiatives which pertain to the status and use of the official languages. The Committee would also ratify the appointments of Chief Executive Officers of culturally-oriented federal agencies and crown corporations such as the Official Languages Commission and the Canadian Broadcasting Corporation. In addition to using the Council's power of ratification over cultural matters in which the central government has the power to act, the dualist committee would have a mandate to ensure that the Civil Service reflects Canadian dualism at all levels.[18]

Many of the proposals for a body made up of delegates of the provincial governments are patterned on the experience of the Bundesrat in the Federal Republic of Germany. This reliance on the German model is made most explicit in the British Columbia scheme. While it is perverse and parochial not to take into account the experience of other nations in contemplating the redesigning of one's own institutions, the circumstances of German government are so different from those in Canada as to raise questions about the applicability of the Bundesrat solution here. As pointed out in Chapter 4, German federalism differs radically from that in Canada in that it is based not on a division of legislative powers between two orders of government. Instead, the law-making powers reside in the national government but many are executed by the Lander. Thus the Bundesrat is the mediating institution between legislative and executive authority. This is of course not the Canadian circumstance. Even though, as noted in Chapter 4, the pressure of increased federal-provincial interdependence has lessened the distinction between legislative and administrative federalism, the Canadian practice is for the jurisdiction enacting a law to be held responsible for carrying it out as well. The major deviation from this concerns criminal law, which is passed by Parliament and administered by the provinces. While this difference does not rule out the suitability of a Bundesrat-type institution in Canada, it does point out the need for careful analysis before embracing it.

The proposal for an institution composed of provincial delegates has frequently been advocated in the Canadian context on the grounds that such a body would facilitate intergovernmental collaboration. By sensitizing the federal government in its legislative processes to the concerns of the provincial governments, it would represent a point of convergence between interstate and intrastate federalism. The proposal of the Task Force on Canadian Unity for a Council of the Federation, for example, emphasizes this point. It argues for a radical departure from the more traditional parliamentary second chamber. The Beige Paper goes even further in explicitly stating that its projected Federal Council

would in no sense be a legislative assembly. In such circumstances, there is no compelling reason why the existing Senate would become redundant since the new institution would be performing quite distinct functions. But in fact all the Canadian proposals for a Bundesrat-type institution have coupled this with abolition of the existing Senate. The reason presumably is that the proposed institution would be performing the intrastate function of regional representation usually attributed to federal second chambers.

Significantly, most of these Canadian proposals view a Bundesrat-type institution as complementary to rather than as a substitute for the more traditional cooperative mechanisms of federal-provincial relations. Indeed, the Beige Paper suggests that:

> If the Federal Council functions as it should, it might be possible to graft to it many of the co-operative mechanisms [of federal-provincial relations] now widely dispersed.[19]

Critics have been concerned that, if the main thrust of a Bundesrat-type institution is the institutionalization of intergovermental relations, this itself might reduce in some measure the flexibility those processes now have. It has been a characteristic of Canadian executive federalism in both its federal-provincial and interprovincial dimensions that the procedures of intergovernmental association are not highly institutionalized. Who has the authority to convene meetings? How is the agenda determined? What are the rules by which decisions are made and dissents from decisions recorded? To what degree, if any, is an incoming government bound by the actions of its predecessors?

To the extent that the new body contributes to the institutionalization of relations among governments, these relations would be more explicit and open to public scrutiny. But would this settle the federal-provincial conflict? Each order of government may become more sensitized to the constraints and interests of the other. On the other hand, there may be some loss of flexibility. For example, in his recent monograph on Canadian industrial policy, Michael Jenkin suggests the potentialities of federal-provincial agreement in bilateral relations which are not possible when all the provinces are involved.[20] Of course, proponents of a Bundesrat-type body do not argue that it should replace such bilateral arrangements. Still, such bilateral cooperation may well become restrained if intergovernmental relations were formalized.

To those who would argue that a Bundesrat-type body would facilitate improved intergovernmental relations, the question is sometimes raised how a body made up only of provincial government delegates could function as an intergovernmental body. Would it be like a federal-provincial conference without the federal representatives present? Such a response focusses more upon the composition of such a body

than on its functions and processes. The federal government would be very much involved through its control of legislative proposals or appointments and thus the agenda. The formal role of the Bundesrat-type body would then be merely one of ratification or denial of ratification of those proposals brought forward by the federal government. Insofar as it requires that ratification, the federal government would be more sensitive to provincial interests and concerns. For their part, the provincial governments would have the opportunity to sensitize the federal government to the views of a majority of the provinces. They would be limited only by the knowledge that, except on issues safeguarded by an absolute veto, the federal government could override them if they became intransigent.

There is a need for caution in establishing such a body in Canada. Federal-provincial conflict during the past decade stems largely from the eagerness of provincial governments to involve themselves in matters largely or exclusively within Ottawa's jurisdiction. In a paper delivered in 1978 when he was Secretary to the Cabinet for Federal-Provincial Relations, Gordon Robertson reported on this tendency.[21] The Western Economic Opportunities Conference of 1973 was a "milestone" in this development. On this occasion, the four western governments were successful in having the agenda of the meeting almost entirely devoted to federal policies as they impinged on the region. Robertson deplores this and attributes it to the lack of "an effective forum for open regional advocacy and brokerage within our institutions at the federal level of government."[22] Nonetheless, he rightly points out that the welfare of federalism requires a division of labour in which each government is responsible for matters within its assigned jurisdiction. He notes that no federal involvement in provincial responsibilities was proposed corresponding to those which the provinces were attempting to impose on Ottawa. The provinces appeared to be saying to the federal government, "What's ours is our own and what's yours is ours."

It may be impossible to attain an effective federal system without a high level of interdependence between Ottawa and the provinces. It would be inappropriate to hobble Ottawa by creating a Bundesrat-style institution in a form which would permit the provincial governments to block the federal authorities in matters within the latter's exclusive jurisdiction. In the West German Bundesrat and in most of the Canadian proposals for a similar institution, the authority of the council of provincial representatives is severely limited in regard to those matters under exclusive federal jurisdiction, and their functions are focussed primarily on areas of joint federal-provincial responsibility. This would considerably narrow the scope to provide an element of intrastate federalism in matters within exclusive federal authority.

An Elected Senate

There has been considerable support recently for replacing the Senate with a second chamber of Parliament directly elected by the people of Canada. The general principle of an elected Senate appears to be popular among the general public. Several prominent senators — among them Royce Frith, Michael Pitfield and Duff Roblin — have declared their support for an elected second chamber. There are two documents which give detailed rationales for such a reform: the study *Regional Representation*, written under the auspices of the Canada West Foundation by Peter McCormick, Ernest Manning and Gordon Gibson, and published in 1981;[23] and the report of the Senate and House of Commons Special Joint Committee on Senate Reform, made public on January 31, 1984.[24]

The McCormick-Manning-Gibson study is squarely within the tradition of centralist intrastate federalism. It deplores the existing situation in which, because of the unresponsiveness of the federal government to regional interests and needs, the provincial governments have assumed the almost exclusive role of articulating regional interests.

Thus:

> It is not appropriate that the provincial governments be the only political focus for regional sentiments because this would imply that any assertion of regional feeling takes the form of pushing the federal/provincial balance of effective power further in favour of the provinces. The need is for institutions within the national government that accommodate regional interests by giving them an effective role in the process of making national policy. In the present context of Canadian political institutions, one can assert regional loyalty only by attacking Ottawa.[25]

The study analyzes other proposals suggested to adjust the Canadian constitutional political system to the demands of regionalism. It finds these either undesirable in themselves or incapable of mitigating the situation they are designed to meet. Among those analyzed are: extension of the legislative powers of the provinces, changes in the electoral system by which members of the House of Commons are chosen, replacement of the Senate by a body composed of delegates of the provincial governments, and reforms in the House of Commons to free MPs from the restraints of party discipline so as to represent provincial interests more effectively.

The McCormick-Manning-Gibson study makes the following recommendations:

1. The existing Senate should be replaced by a body consisting of six to ten members from each province elected by the single transferable vote system or proportional representation from province-wide constituencies. Each of the Yukon and Northwest Territories should elect one or two members. Elections should take place at the same

time as those for members of the House of Commons. Senators would be elected for two terms of a Parliament with half the senators retiring at each general election.

2. The government would be responsible to the House of Commons alone and, as under the existing situation, money bills could be introduced only by ministers of the Crown and may not originate in the Senate.

3. Apart from money bills and confidence motions, the elected Senate would be "formally recognized as an integral part of the formulation of national policy."[26] The Senate would be involved in all legislation with the proviso that "with regard to ordinary legislation the negative vote of the Senate should be over-ridden by a repassage of the rejected legislation through the Commons by an unusual majority."[27] On the following matters, the Senate would have an "absolute veto" which could not be overridden by the House of Commons:

   a) amendment of the Constitution of Canada;
   b) ratification of appointments to "national tribunals, boards, and agencies of special regional significance" such as the Canadian Transport Commission, Canadian Radio-television and Telecommunications Commission, the Canadian Wheat Board and the National Energy Board; and
   c) ratification of "extraordinary powers," including emergency power, declaratory power, spending power as exercised on matters within the legislative jurisdiction of the provinces and, if these remain in the constitution, the powers of reservation and disallowance.

The McCormick-Manning-Gibson study thus recommends an elected Senate with very considerable powers to frustrate governments backed by majorities in the House of Commons. The study does not specify whether the House of Commons majority required to override the Senate on other matters would be two-thirds or otherwise. Achieving this would almost inevitably require the government to gain the support of at least one of the opposition parties in the Commons. Under these conditions, such recent majority governments as were elected in 1968, 1974 and 1980 would have been in effect converted into minority governments with respect to legislation where the Senate had veto powers and had registered dissent.

The report of the Special Joint Committee on Senate Reform published on January 31, 1984 makes the following proposals:

1. The existing Senate would be "phased out" over a six-month period and replaced by an elected Senate consisting of 24 members each from Ontario and Quebec, 12 each from Nova Scotia, New Brunswick, Newfoundland and the four western provinces, six from Prince Edward Island, four from the Northwest Territories and two from the Yukon.

2. Apart from bills of "linguistic significance," the Senate would have suspensory veto of 120 sitting days of Parliament, which could be overridden by the House of Commons after that period.
3. Bills of linguistic significance would be subject to an absolute Senate veto, with such bills requiring a Senate majority consisting of a majority of francophone senators.
4. Order-in-council appointments to federal agencies whose decisions have important regional implications would be subject to Senate ratification within 30 sitting days. If the Senate did not reject such an appointment in that period, it would be deemed to have ratified it.
5. Senators would be ineligible to serve as parliamentary secretaries or cabinet ministers.
6. Senators would be elected for nine-year, non-renewable terms, with a third retiring each three years from single-member constituencies in a first-past-the-post electoral system.

The proposals for an elected Senate raise a number of issues. The most fundamental issue concerns the powers that may be exercised to override the will of governments backed by majorities in the House of Commons. The McCormick-Manning-Gibson study provides for a much stronger Senate than that recommended by the special joint committee. In the latter case, the Senate may, except in certain federal appointments and matters of linguistic significance, be overridden after a 120-day period by an ordinary majority in the House of Commons. The former study gives the Senate an "absolute veto" in several matters, with an extra-ordinary majority needed in the House of Commons to override the Senate.

We see little point in the special joint committee's proposal that an elected Senate be restricted to a relatively short suspensive veto over ordinary legislation. Presumably the object of such a proposal is to put barriers in the way of unwise and ill-considered legislation being rammed into law. However, Parliament itself has developed considerable capacity for obstruction — witness in the last Parliament the bell-ringing incident and other measures to disrupt passage of the Crow's Nest Pass legislation, the measures related to a civilian security agency and prohibitions on provincial government ownership in corporations engaged in interprovincial transportation. The suspensory veto would of course limit the government's capacity to manage the legislative timetable. It would give the Senate enormous power in circumstances where the government saw great urgency in passing legislation quickly, as in back-to-work bills. However, in more usual situations, a government could without undue difficulty or embarrassment wait out the Senate and override its veto.

The recommendation of the special joint committee that the Senate would have an absolute veto over "legislation of linguistic significance" and that a majority of the francophone senators would be required to

give assent appears on the surface to be a valuable safeguard for the rights of the French language. Such a provision might have some symbolic value but in operational terms would probably amount to very little.

First, the Parliament of Canada enacts little legislation dealing explicitly with language. The Official Languages Act, 1969, is of course the major exception.

Secondly, since the Charter of Rights and Freedoms came into effect in 1982, the Parliament of Canada has had little discretion to reduce the rights of the two official languages insofar as these are contained in existing legislation. Admittedly some discretion no doubt remains, although to assess its scope would require a detailed examination of existing law along with some speculative judgments about how the courts would interpret the language provisions of the Charter. However, Parliament's constitutional capacity to reduce French language rights appears limited.

Thirdly, the double-majority rule gives the francophone community no more rights than would a simple majority rule if the legislation under consideration involves the extension of French language rights. While the Constitution restricts the authority of Parliament to further restrict the rights of the two official languages, section 16(3) of the Constitution Act declares, "Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French." One might reasonably hypothesize that, if the special joint committee's recommendations had been in effect in 1969, the Official Languages Act would not have been enacted. Both major parties relied on party discipline to secure the support of their members for the measure and, as has been characteristic of that body, the Senate went along. However, under the special joint committee's plan, with senators acting independently of party discipline, it might be possible for the 48 senators from the West to combine with anglophone senators elsewhere in order to block a similar measure.

The McCormick-Manning-Gibson study and the special joint committee report propose that the Senate have the power to ratify certain federal appointments. Both are somewhat imprecise in designating the appointments to which such powers could apply or the criteria which should be used in making such a designation. For example, should ratification include only the chief executive officer of regulatory bodies and public corporations? Or should this be extended to the part-time positions on their respective boards? One can only conjecture about how vigorously an elected Senate would use this power. The tradition may grow that the government in most circumstances should have its way with respect to such appointments, with the Senate being actively involved only when outrageously partisan considerations lie behind the government's choices. The Senate may become aggressive on some

kinds of appointments and not others. All this is in the realm of conjecture. However, we would accept the general principle that an elective Senate should provide a public screening for prospective appointments of the heads of a few crucial federal regulatory agencies and public corporations. We also suggest that this power of ratification be extended to appointments to the Supreme Court of Canada.

Any recommendation for an elected Senate must come squarely to grips with the conflict between the power of an independent Senate and the principles of responsible government. Under responsible government, the cabinet has a mandate to govern within the maximum life of Parliament as specified in the constitution. This mandate is derived from the results of the previous general election and the government's continuing capacity to be sustained by a majority in the House of Commons. An elected Senate would introduce into the political system an institution whose members have a different democratic mandate. Moreover, since it might be expected that an elected Canadian Senate would, most or all of the time, have a different regional and partisan/political composition than that of the House of Commons (especially if its members were to be elected by some form of proportional representation and the House of Commons were not), one can confidently predict that the majorities controlling the two chambers would often be in conflict. There is little point in establishing an elected Senate to introduce a significant element of intrastate federalism and then to make that almost meaningless by giving it a weak suspensive veto in order to reconcile it with responsible government.

Some of the hesitation about establishing a strong, elected Senate appears to have arisen from Canadian interpretations of the Australian constitutional crisis of 1975.[28] The bare outlines of these complicated events were as follows. The Whitlam Labour government was returned to power in 1974 in an election of the House of Representatives and all the members of the Senate. The government's majority had been reduced from nine to five in the House. It failed to gain a majority in the Senate. Within six months, the government faced a hostile majority in the Senate when two states deviated from long-established practice and filled two vacancies with non-Labour senators. In the fall of 1975, the Opposition forces decided to use their Senate majority to force the government to an early election: when appropriation bills came before the Senate, that body declined to pass these bills unless the government agreed to a dissolution. The prime minister refused to go along, but the governor general dismissed the government and installed a caretaker ministry under the former Opposition leader. This was done on the understanding that no new legislative measures would be introduced to Parliament prior to a general election. On the same day, the Senate granted supply and Parliament was dissolved. A double dissolution occurred when the Senate refused to enact some 16 bills which had been sponsored by the

government and passed by the House of Representatives. In the ensuing election, the Liberal/Country coalition won a majority in both chambers of Parliament.

There has been an enormous amount of writing about the 1975 crisis by Australians and others. Several interpretations concerned its implications for the relation between responsible government and elective bicameralism. According to one line of argument, the crisis proved beyond doubt that responsible government and elective bicameralism are irreconcilable and that the constitution should be changed to secure the primacy of responsible government. Therefore, it is argued, the constitutional powers of the Senate must be restricted and its power to defer or refuse supply must be eliminated. A contrary line of interpretation stresses the need of a powerful Senate to restrain governments backed by docile majorities in the House of Representatives. According to this argument, the Senate acted appropriately in 1975, its powers should not be restricted, and the political validity of its action was demonstrated by the decisive defeat of the Whitlam government in the subsequent general election. Yet another line of argument suggests that the 1975 crisis was an aberration. The Australians after all have proved able to reconcile responsible government with an elected Senate both before and after those dramatic events. The party which now holds the balance of power in the Senate, the Australian Democrats, is pledged not to use its position to refuse or defer supply, and it is at least possible that the continuing memories of the 1975 events will restrain Australian politicians from bringing about such a constitutional crisis in the future.

Chapter 3 argues that responsible government should not be a shibboleth. Certain measures to make the institutions of the central government more representative of and responsive to provincial and regional interests should not be dismissed simply because they would challenge the usual concept of responsible government. Moreover, despite the 1975 crisis, Australian experience suggests that in the longer term an elected Senate with significant power is not a barrier to effective government. As noted in Chapter 4, there can be benefits in the influence that such a body can bring to bear on governments.

Thus, we would reject the special joint committee's proposal that it should be possible to override the Senate on most matters with a simple majority of the House of Commons after only 120 sitting days. Given the regional party imbalances of the past decade, which were powerfully influenced by the existing electoral system, limiting the authority of the Senate in this way would fail to protect regional values and interests from overweening federal action challenging local concerns. There are a number of alternative mechanisms for resolving deadlocks between the two chambers, including

- overriding a Senate veto by the House of Commons only after an ensuing general election;

- submitting deadlocks to the will of a joint sitting of the two chambers;
- overriding a Senate veto by an unusual majority of the House of Commons which would in most cases require the government to gain the support of one or more of the opposition parties, as suggested in the McCormick-Manning-Gibson study;
- adopting a variant of section 56 of the Australian Constitution whereby both chambers are dissolved; or
- passing a measure of regional significance that was vetoed in the Senate a second time in the House of Commons with a two-thirds majority.[29]

With the modification that the Senate's power to deem a matter to be of regional significance should exempt taxing and expenditure measures, we favour the latter proposal. One advantage of this scheme is that the determination of whether a measure is of regional significance is made through the processes of debate and negotiation by the Senate itself. These kinds of questions are essentially political and it is preferable that they should be resolved in a political forum rather than in the courts. We would, however, preserve the supremacy of the government over supply measures on the general grounds that to do otherwise would unduly challenge the capacity of the executive to govern effectively.

There are two further circumstances under which an elected Senate might modify the regime of responsible government familiar to Canadians.

First, as suggested in Chapter 3, the existence of an elected Senate would somewhat qualify the existing power of the prime minister and his cabinet to speak for and commit the Government of Canada. This is crucial in Ottawa's dealings with the provinces, but there are no corresponding restraints on the provinces in their respective jurisdictions.

Secondly, a federal government's legitimacy in remaining in office may be compromised in some circumstances. If an election for part of the Senate were to take place during a government's third year in office and if the major issue were the government's record, then the government party may sustain a decisive defeat in the Senate. Under such a circumstance, the government's legitimacy in the House would be compromised. Opposition and public pressure might force it to call an election which otherwise would have been delayed for a year or more. Yet again we see nothing sacred in the operating rule that the prime minister should have the unfettered power to decide when a general election is to be held, subject only to the reserve power of the governor general under very unusual conditions to refuse a dissolution. In the wake of their 1975 constitutional crisis, Australians have debated the appropriateness of fixed-term Parliaments under which the legislature would continue through its term as determined by the constitution save only when the government lost the confidence of the lower chamber. Under another

variant, an election before the end of the term would occur only where it proved impossible to form another government with the support of the House. This would not compromise an inviolable principle.

The Role of Parties in an Elected Senate

The McCormick-Manning-Gibson study and the special joint committee report agree that senators cannot act as effective representatives of regional interests when party influence over their behaviour is weak. The former analysis proposes that:

- all votes in the elected Senate would be free votes;
- the political parties of the Senate would caucus separately from their party colleagues in the House of Commons, although this would not be expressed as a constitutional prohibition;
- there would be a constitutional provision against ministers being members of the Senate; and
- senators would be elected by the single transferable vote system of proportional representation, which would maximize the opportunities of voters to choose among individual candidates and minimize the role of political parties in the electoral process.[30]

The special joint committee's recommendations also are deliberately designed to minimize the influence of party in the Senate. Recommendations to this end include a non-renewable term, rejection of proportional representation, a proposal that senators be ineligible to serve as ministers or parliamentary secretaries, and a suggestion that Senate elections be held at different times from those of the House of Commons.

A role of senators to act as non-partisans would exaggerate the existing regional imbalances in the parliamentary caucuses of the two major parties. If senators did not participate in such caucuses or abide by caucus decisions, regional influence on party policy might be even less than it was in recent years, when, for example, Liberals had little representation from the West and the Progressive Conservatives had little representation from Quebec prior to the 1984 election. Also, the special joint committee's proposal barring ministers from sitting in the Senate would forbid the prime minister to appoint senators to his cabinet from provinces and regions which elected none or few government members to the House of Commons, as was done in the Clark cabinet of 1979 and the Trudeau cabinet of 1980.

The levels of party cohesion that would prevail in an elected Senate are a matter of conjecture. As suggested in Chapter 5, party cohesion in the House of Commons can in large measure be attributed as much to internalized norms as to the sanctions that the parties and their leaders have over MPs. Added to these is the parliamentary requirement that

governments must have the confidence of the House in order to remain in office. Party influence in the present Senate remains strong, despite the tenure of senators and the knowledge that they cannot be challenged by their respective parties. In general, we would expect that party affiliation would be an important determinant of the conduct of elected senators whatever institutional devices are established to frustrate these dispositions.

The special joint committee recommends that senators be elected from single-member districts under the plurality system. The McCormick-Manning-Gibson study proposes the single transferable vote system of proportional representation from province-wide constituencies. How do they compare?

We would reject the special joint committee's proposal on two grounds: First, the regional party imbalances in the Senate would in all likelihood duplicate that prevailing in the House of Commons. Thus, if regional imbalances in party representation recur in the future, then there may be few Progressive Conservative senators from Quebec or few Liberal senators from the West, even though a considerable proportion of the Quebec and western voters cast their ballots for them. Secondly, such a Senate may include few members of relatively under-represented groups — women, members of visible and ethnic minorities, relatively young persons and so on. Whereas the single-member district system favours majority groups, proportional representation is more advantageous to minorities since parties contriving lists of candidates in multi-member constituencies have incentives to "balance the ticket."[31]

We also question the appropriateness of a nine-year, non-renewable term for senators as proposed by the special joint committee. On general democratic principles, we expect the conduct of elected office-holders to be determined in considerable degree by their prospects of being re-elected, which is precluded by the special joint committee's recommendation. Each Senate election would result in the turnover of one-third of that body's membership which, with resignations and deaths from time to time, could severely weaken that Senate's capacities and collective esprit de corps. Moreover, the non-renewable term would prevent many otherwise capable persons from seeking Senate office. A young and ambitious person might seek office at the beginning of a political career which would start in earnest after the Senate term was completed; and a person over the age of, say, 55 might find Senate service an attractive end to a career in politics or elsewhere. Yet few persons in middle life would find it either possible or attractive to offer themselves for Senate service and to leave their ongoing careers.

We favour the single transferable vote system of proportional representation for electing senators, as recommended by the McCormick-Manning-Gibson study. The Australian and Irish experiences suggest that partisanship would influence the electoral process for the Canadian

Senate as well, despite the greater choices available to voters. However, we believe it unrealistic to visualize an elected Senate whose choice and subsequent operations are in some general sense sanitized against partisanship.

A last issue relates to whether or not Senate elections should be held simultaneously with those for the House of Commons or at different times. In general, we favour the second option, principally because the public visibility and perceived importance of the Senate would be enhanced if it were chosen in an election where the chief issue was not to determine which party should form the government. A problem may arise, however, as suggested earlier, if the major issue in a Senate election were the record of the incumbent government. If the government party sustained a decisive defeat following such an election, it might have to consider resigning, though this has not been the Australian experience.

The Second Chamber as a House of Review

The preoccupation with issues of intrastate federalism has focussed proposals for Senate reform on regional representation. Those who would replace the existing Senate either with a body of delegates of the provincial governments or with a second chamber chosen by popular election have emphasized the need to give regional values and interests a more effective outlet.

Yet there is another traditional function of a second chamber which may be designated broadly as the house-of-review role, and which should not be neglected. Indeed, it is important that this role be played effectively in the Parliament of Canada.

Until recently and to some extent even today, bicameralism in nations operating within the traditions of liberal constitutionalism has been defended as a device to moderate the influences of popular democracy. Various provisions in the composition of upper chambers have sustained this objective — hereditary membership, appointment for life or for relatively long terms, indirect election, procedures for the special protection of ethnic and other minorities and so on. Although in contemporary federations it is impossible to sustain the legitimacy of the existing Canadian Senate, it is challenged on precisely these grounds: federal second chambers, as we have previously noted, are usually constituted to provide for the representation of persons by virtue of their residence in states or provinces, and the smaller of these subnational jurisdictions invariably receive membership disproportionately large in terms of their populations.

But apart from its role in the protection of state or provincial interests, the second chamber of the central legislature in a federal polity can be justified in terms of its function as a house of review. Although that

terminology was not used in that document, the house-of-review formula was spelled out most concretely in the 1918 report of a British all-party committee chaired by Lord Bryce which was charged with investigating and reporting upon the appropriate functions of a second chamber in the United Kingdom.[32] These functions were:

- a leisurely and thorough examination of bills which would of necessity be dealt with more hastily in the House of Commons;
- initiation of relatively uncontroversial bills in order to economize the time of the lower house;
- interposition of so much delay (and no more) in the passing of a bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it; and
- full and free discussion of large and important questions under circumstances which do not involve the tenure of the government.

A more recent emphasis sees the house-of-review role of a second chamber primarily in terms of an institutional safeguard against the excess of executive power. In his review of the Senate of Canada, F.A. Kunz concludes that second chambers

> should maintain a suspicious watch over any attempt on the part of the executive to act arbitrarily or to bypass Parliament by sheer force of administrative habit or bureaucratic usage and thus unduly further increase its grip over the other branches of Government. . . . Instead of being a primary institutional check, as they used to be, upon the people's house, they are now an auxiliary institutional check upon an inflated executive dominating the people's house.[33]

If it is deemed desirable that the executive should be subject to a legislative check, this function might of course be performed by the lower chamber. The Australian political scientist Joan Rydon writes:

> It is difficult to perceive of any function claimed for a second chamber as a house of review which could not be performed within one (if necessary enlarged) chamber. It would be possible to devise rules for delay between the stages of legislation, prescribe that certain matters must be sent to investigative committees, that on others interested bodies must be given time to submit opinions, that special majorities be required for certain types of decisions, etc. A system of rules and procedures might be created within a single chamber which would guarantee a closer review of legislation than any second chamber has ever provided.[34]

Yet although the review role need not in logic be performed by a second chamber, there are some reasons to believe that in Canada the House of Commons will not perform this role well. Partisanship permeates almost every aspect of Commons life, whereas effective review activity requires that committees develop a high degree of collegiality which blurs party lines and party allegiances. The review of legislation involves for the

most part technical considerations and has few payoffs for politicians to whom publicity is meat and drink. Futher, there is the need for a legislative chamber, through its committees, task forces and enquiries, to take in hand important matters not high on the public agenda at a particular time and to investigate these matters in a relatively disinterested way.

In the current debate, there has been regrettably little concern with the house-of-review role. Neither the McCormick-Manning-Gibson study nor the report of the special joint committee examine the likely impact of their proposed changes on performance of this role. Nor has there been any detailed examination of how well the existing Senate performs this function. Kunz's study of the Senate between 1921 and 1963 gives that body a relatively favourable evaluation in this connection. Colin Campbell in his more recent book is very critical; the Senate is in his view a "lobby from within" on behalf of business interests, and should be abolished.[35] J.R. Mallory writes of the Senate–House of Commons Committee on Statutory Instruments established in 1972:

> While its Commons members make a valuable contribution in spite of extraordinary demands on their time, the most valuable element in the committee is its Senate component. The senators not only have more time at their disposal, but are likely to be on the committee for longer periods of time and thus are more familiar with its work. Furthermore senators are likely to be more dispassionate and less partisan in their work on the committee.[36]

The review of statutory instruments is one of the most crucial aspects of the more general house-of-review role and Mallory's judgment is thus of considerable importance. Yet, to repeat, the current debate on the second chamber has been almost completely preoccupied with the representational dimension.

A discussion paper titled "Reform of the Senate" published in June 1983 over the signature of the Minister of Justice states categorically:

> *The legislative review and legislative support function* is one that has been filled effectively by the present Senate and it is one the Government of Canada would like to see preserved in a reformed Senate.[37]

The document does not give any supporting evidence for these conclusions, and it is perhaps not unfair to surmise that, in the perspectives of the writers of the discussion paper, the review function is of only marginal importance, certainly much less crucial than the representation of provinces and regions. In the terms of reference of the special joint committee in December 1982, there is no reference to the house-of-review role, and the committee was charged:

> to consider and report upon ways by which the Senate of Canada could be reformed to strengthen its role in representing people from all regions of

Canada and to enhance the authority of Parliament to speak and act on behalf of Canadians in all parts of the country.[38]

If a second chamber were reconstituted as a body of delegates of the provincial governments, it is unlikely that the house-of-review role would be performed adequately. There seems no reason to dissent from the judgment made in the 1983 discussion paper:

> Legislative review would also be carried out [by a Bundesrat-type body] but . . . from a particular point of view. It would probably focus less on the technical improvement of legislation or on regional interests broadly defined than on the particular concerns of provincial governments or contentious issues in federal-provincial relations.[39]

It is more hazardous to estimate how well an elected Senate would perform the review role. Under the schemes presented by the joint committee of nine-year, non-renewable terms and with one-third of the membership of the Senate being replaced every three years, the lack of continuity on committees might hamper the effectiveness of the house-of-review function. However, the Australian experience indicates that an elected Senate can do well in review under certain conditions. There are eight standing committees of that body covering all the major functional areas of government — Education and the Arts, Finance and Government Operations, Natural Resources and so on. The Regulation and Ordinances Committee was established in 1932 and, on the basis of its record since that time, there is no reason to challenge the statement of the committee itself in its 1982 report, "The Australian Senate is the world path-finder in the area of parliamentary authority." The Scrutiny of Bills Committee was established in 1981 to scrutinize proposed legislation according to basic civil liberties criteria. The Senate has been active in mounting select committees to inquire into particular matters.

It is not altogether easy to explain why the elected senators in Australia are so aggressive in playing the unspectacular review role which carries with it little publicity or partisan/political payoffs. One explanation may be that the Australian Parliament sits for only 60 to 80 days each year, and its members have more time for committee activity while Parliament is not in session than their Canadian counterparts. On the other hand, the House of Representatives is even less adequate in the review role than is the Canadian House of Commons. A tentative answer to the puzzle of why elected politicians are so effective in legislative review is that the senators, or most of them, find this a necessary and personally satisfying activity. Moreover, the state party executives who are responsible for nominating candidates for the Senate and for ranking these persons on the ballot are willing to allow senators to do this so long as a considerable proportion of the latters' time is available for party duties. It should be noted in this connection that the control of the

nominating function is in the hands of extra-parliamentary elements of the parties rather than in those of parliamentary leaders.

Size and Regional Composition

The size of a legislative body no doubt determines how it operates, but there is scant knowledge how this works. Apart from the United Kingdom, in all nations the upper chambers of legislatures have fewer members than the lower and we see no reasons for Canadians to depart from this practice. Because all the votes of a province are cast in one bloc in a Bundesrat-type house, the size of a House of the Provinces/House of the Federation could be quite small. The heads of provincial delegations might be assigned the number of votes corresponding to their respective entitlements under the representational formula in effect. In an elected Senate, the size would be of more consequence and would need to be large enough to:

- allow effective representation for partisan, political or other minorities within even the smallest province or other constituencies from which senators are elected; and
- permit the staffing of a large number of specialized committees on the basis of the representation of provincial or regional, and political or other interests.

So far as the provincial or regional composition of a reformed second chamber is concerned, there are two polar alternatives. The first is representation on the basis of provincial population. Yet, for readily understandable reasons, all federations give the smaller states or provinces some degree of over-representation in the upper house and no one has seriously suggested that Canadians depart from this general rule. The other alternative, following the practice in the Senates of the United States, Australia and a number of other federations, is to give the provinces equal representation, as recommended in the McCormick-Manning-Gibson study. However, there seems little support in Canada for this, and we believe it should be rejected. In the United States, the conflict at the Philadelphia Convention of 1787 between the larger and smaller states was resolved with a historic compromise of representation by population in the House of Representatives and equality of the states in the Senate. There has been no issue of consequence since then that pitted the large and small jurisdictions as blocks against one another; consequently the equality of state representation in the Senate has continued to prove tolerable to the larger states. It might not be so in an elected Canadian Senate. So far as fiscal redistribution and the alleviation of regional economic disparities are concerned, the five provinces with the smallest populations are "have not" jurisdictions while four of

the five largest provinces are in the "have" category. If there is equality of provincial representation, the four Atlantic provinces and Manitoba may combine with representatives of the Yukon and Northwest Territories to form a Senate majority representing less than one-fifth of the Canadian people. In general, therefore, given extreme variation in provincial size, we would reject equal provincial representation in a reformed second chamber.

There are various proposals for fixing the composition of a reformed second chamber to give some over-representation to the smaller provinces short of strict equality.[40] We see no principle to guide us in choosing among such alternatives. However, whatever pragmatic balance is accepted should contain some procedure which would take account of significant changes in the provincial proportions of the Canadian population.

A last consideration relates to the special needs and interests of Quebec. A thoroughgoing two-nations approach to Confederation to give equal representation of the two cultural communities in government would disrupt equality of provincial representation, and should be rejected. On the other hand, a just and stable political order requires at least some constitutional recognition of Quebec's special circumstance. On this basis, we see the need for some special recognition of Quebec's position. One choice would be to follow the recommendation of the Beige Paper that Quebec be guaranteed in perpetuity a minimum proportion of seats in the second chamber regardless of the relation its population bears to that of Canada as a whole. Both the Beige Paper proposal for a Federal Council and the special joint committee's scheme for an elected Senate recommend that these bodies be given special powers to safeguard linguistic and cultural dualities. However, Parliament does in fact enact very little legislation directly related to language. Since the coming into effect of the Charter of Rights and Freedoms in 1982, official-language minorities will almost inevitably look primarily to the courts as the defenders of their rights and privileges. Moreover, insofar as Quebec has looked to safeguards for its cultural and linguistic distinctiveness primarily in terms of strengthened provincial powers, it has sought interstate rather than intrastate solutions.

Changes in the Existing Senate

The abolition of the existing Senate and the subsequent establishment of either a Bundesrat-type body or an elected Senate would require a constitutional amendment under the provisions of section 38(1) of the Constitution Act, 1982. For such an amendment to be made, the assent of Parliament is required, in which the Senate has only a 180-day suspensory veto, and also the assent of the legislatures of seven of the provinces having in aggregate at least half the Canadian population. It will in all

likelihood be difficult to secure this much consent for fundamental changes to the second chamber, although the possibilities of getting this agreement would be much better if such changes were part of a more comprehensive package of constitutional reforms.

Because radical reform of the second chamber will be difficult, it is prudent, even for those who believe this kind of reform urgent, to consider changes which may be made without resort to section 38(1). Some of these might be made by convention, others by an act of Parliament under section 44. There remains a degree of uncertainty as to how far Senate reforms, especially those regarding appointments and terms, might go without resort to the somewhat stringent requirements of section 38(1). Section 42(1) requires that the provisions of section 38(1) apply to:

(b) the powers of the Senate and the method of selecting Senators;
(c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators.[41]

In its report, the special joint committee suggests, albeit in a somewhat tentative way that, without resort to the general amending procedure, a nine-year, non-renewable term for future appointments to the Senate might be established. If the committee's view is constitutionally valid, there are no limitations imposed on the development of conventions related to who might be appointed as senators and their terms. A recent practice has grown up by which Liberal prime ministers have filled Senate seats formerly held by Conservative senators who died or retired after consulting with the Progressive Conservative leader. Following this general procedure, the Governor-in-Council — in effect, the prime minister — might share in any way the power to make appointments to the Senate and, presumably, to determine the length of such terms, with the sole restriction that senators must retire at age 75. There have been several proposals advanced for reforming the procedures by which senators are appointed.

- The special joint committee recommends future Senate appointments for nine-year, non-renewable terms.
- The 1969 White Paper titled *The Constitution and the People of Canada* recommends that some of the Senate be appointed by the federal government and some by the provincial governments.
- Bill C-60 put before Parliament by the federal government in 1978 recommends that half the members of the Senate be chosen by the Parliament of Canada and half by the legislatures of the provinces. The number of members so selected would be proportional to the popular vote received by the parties in the most recent federal or provincial general election. In effect, senators would be chosen by federal and provincial party leaders after each such election.

- The proposals of the 1972 Joint Senate–House of Commons Committee on the Constitution and the Goldenberg-Lamontagne report of 1980 recommend that the federal government continue to make all appointments but half of those would be from lists submitted by the provinces.

We make no judgments about the constitutional validity of such proposals. Presumably the Governor-in-Council would continue in form to make appointments to the Senate, but in fact the discretion of the prime minister would be qualified by the actions of other persons or groups. Whether and under what conditions the courts would determine such practices regarding Senate appointments to be constitutionally invalid is uncertain.

Until such time as agreement upon an elected Senate is reached, it would seem desirable to proceed with improvements in appointments and the processes of the Senate insofar as these are possible by convention or actions of Parliament alone. We see serious problems, however, with the proposals that senators be appointed for nine-year, non-renewable terms and that the provincial governments or legislatures be given a role in Senate appointments. On the other hand, we do believe that a case can be made for consultation between the prime minister and the leaders of groups representing the native peoples of Canada regarding future appointments of representatives to the Senate. The aboriginal peoples have very specific needs which differ from those of other Canadians. Even the rapid development toward native self-government meets those needs only in part, and the system of representation in the House of Commons does not serve these people well. Therefore, the Senate is a potential channel for articulating native interests and values.

Supporters of an elected Senate argue that no method of appointment can give the second chamber sufficient legitimacy and strength to represent regional and provincial interests effectively. The evidence from opinion research appears to support this point of view. However, such an argument requires qualification. After all, the Canadian Charter of Rights and Freedoms confers on members of an appointed judiciary the power to make important decisions about the Canadian polity. Federal and provincial legislation gives important responsibilities to a large number of appointed officials who serve for fixed terms and during good behaviour. Observers of public affairs recognize the powers wielded by appointed bureaucrats, and a few of these have become important public figures in their own right. In general, then, legitimacy in the Canadian system of government is not monopolized by those who come to their offices through popular election. The weak legitimacy of the existing Senate is attributable not only to the fact that senators are appointed but also perhaps to the common perception that these offices are given for

partisan service alone and involve no significant duties. The appointments during the summer of 1984 and the way in which they were made simply accentuates this public perception. A clear change in the manner of appointment would therefore be an important step in improving that body's credibility. Moreover, any conflict between the elected House of Commons and the appointed Senate would likely make much of this distinction, which would have some considerable effect if the wider public were drawn into determining the outcome. It is plausible to attribute the disposition of the Senate since 1867 not to mount challenges to the Commons to a recognition of this circumstance.

Several other reforms recommended by the special joint committee should be effected, including:

- abolishing the anachronistic property qualification for senators;
- amending the Constitution to provide that the Senate itself rather than the Governor-in-Council shall choose the Speaker;
- extending the power of the Senate as well as of the House of Commons over subordinate legislation by providing that all subordinate legislation not subject to a statutory affirmative procedure be subject to being disallowed on resolution of either House and that the executive be barred from remaking any statutory instruments disallowed for a period of six months from its disallowance; and
- requiring the Governor-in-Council to fill Senate vacancies within a reasonable period of, say, six months after such vacancies occur.

There has been all too little careful analysis of the Senate as it now exists. There is a great deal that needs to be known. What proportion of senators are active in the work of this body? Who are these persons? What directions do their activities take? How strong is the influence of party over the activities of senators? What contributions do Senate committees make to the legislative process? Are senators as ineffectual in representing the interest of the regions and provinces from which they came as conventional wisdom suggests? Even within the framework of the existing Constitution, the Senate might be made a more effective institution than it now is. It should not be too much to ask that the Senate itself develop conflict-of-interest rules to prevent senators from involving themselves in proposed legislation where they have a direct pecuniary interest as members of boards of directors of corporations. Throughout its history, there have been some senators who have found in Senate activity a creative outlet for their talents and experience. These incumbents might reasonably be expected to give more visible meaning to the role of senator as a full-time position. With the existing constitutional obstructions to fundamental change in the second chamber, the pursuit of such change should not be allowed to stand in the way of more limited reforms.

Conclusions and Recommendations

Our general conclusions and recommendations about the reform of the second chamber of the Parliament of Canada may be summarized as follows:

1. The proposal for replacing the existing Senate with a body of provincial delegates has some serious disadvantages.

2. A persuasive case can be made for a popularly elected Senate, especially one with strong powers to influence and even to obstruct governments backed by House of Commons majorities.

3. There are constitutional barriers to radical reform of the second chamber and the improbability of securing the necessary federal and provincial agreement to effect such reforms immediately should not be permitted to close off the very considerable possibilities that exist for changes in the existing Senate.
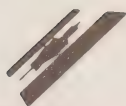
The Supreme Court of Canada

The Supreme Court of Canada has become during the past generation a much more important and visible institution in the Canadian system of government. All major schemes for reforming the constitution have also called for changes to the Supreme Court. A series of postwar developments has increased the crucial nature of the Court and its work.

In 1949, the Supreme Court of Canada displaced the Judicial Committee of the Privy Council of the United Kingdom as the final appellate body in all Canadian cases. Prior to that time, a very large number of cases decided by the Judicial Committee came directly from the provincial courts of appeal, by-passing the Court. So far as constitutional adjudication was concerned, Bora Laskin notes:

> As Privy Council decisions multiplied, the Supreme Court became engrossed in merely expounding the authoritative pronouncements of its superior. The task of the Supreme Court was not to interpret the constitution but rather to interpret what the Privy Council said the constitution meant.[1]

Amendments to the Supreme Court Act in 1974 abolished the automatic right to appeal in civil cases where the amount at issue exceeded $10,000, and gave the Court wide discretion to grant leave to appeal from other courts where important issues of law were involved. Prior to the last decade, most of the work of the Court was in civil matters and many if not most of these cases involved no important legal issues. Since 1974, the Court has had the power to decide, apart from reference cases, most of the cases it will hear.

From the mid-1970s onward, there has been what Peter Russell calls "a veritable explosion of constitutional litigation," a fourfold increase in constitutional cases from the first to the second half of that decade.[2]

Several of the decisions rendered have been important in determining the balance of legislative power between Parliament and the provinces. The increasing reliance of the federal and provincial governments on the courts to define their respective jurisdictions is attributable to the higher incidence of intergovernmental conflict which could not be resolved through the procedures of executive federalism.

The coming into effect of the Charter of Rights and Freedoms in 1982 will undoubtedly increase the power and visibility of the Court. Most cases heard and decided by the Supreme Court may involve the Charter from now on. Further, the declaration of section 52(1) of the Constitution Act, 1982 that "the Constitution of Canada is the supreme law of Canada" moves us away from a regime of parliamentary government qualified by a federal division of legislative powers to one of the supremacy of a written constitution interpreted by the judiciary with the Supreme Court of Canada in the crucial role of final court of appeal.

The increased activity of the Supreme Court in delineating the boundaries of federal and provincial powers has led to considerable criticism from some provinces that this body has ceased to be a neutral umpire of the federal system. Some of the most important and contentious of these decisions have involved natural resources and, as in the case of other attacks on central institutions, much of the criticism of the Court has come from western Canada. In his communication to Prime Minister Pierre Trudeau in the wake of the CIGOL decision rendered by the Supreme Court in 1977, Premier Allan Blakeney of Saskatchewan declared that the way in which the power of the provinces to raise money from their ownership of natural resources had been restricted constituted "a grave risk to our federal system itself."[3] The frontispiece of the British Columbia government's pamphlet on the Supreme Court issued in 1978 quoted, without giving the source, this query, ". . . the Supreme Court of Canada is an institution whose very existence, as well as its composition and jurisdiction, are entirely dependent on the Federal Government. . . . How can a Court subject to these constraints fairly fulfil its rule as impartial umpire of the Federal system?"[4] In his opening address to the First Ministers Conference in the fall of 1978, Premier Peter Lougheed of Alberta said:

Why do we conclude the decision-making process in Canada is far too centralized? There are many examples, but perhaps the most significant is the unilateral imposition by the federal government of rigid control over prices and wages on all Canadians in 1975 — confirmed by the federally appointed Supreme Court of Canada. More recently, interpretations by the Supreme Court of Canada of the Federal trade and commerce power have called into question provincial rights as they have been known and understood for decades. This trend towards over-centralization has significantly threatened the cornerstones of the federal system and has contributed significantly to the fragmentation of Confederation. Alberta is not alone in

opposing the erosion of provincial rights nor . . . is it the only province to express concern about the increasing involvement of the Court in the framing of public policy.[5]

Two legal scholars have denied that the Supreme Court has been biased against the provinces. Gilbert L'Écuyer's study undertaken under the auspices of the Government of Quebec and published in 1979 argues that the Court's interpretation of the British North America Act since 1949 has been faithful to both the letter and spirit of the Act and that the centralizing nature of these decisions is attributable to the nature of the Constitution itself.[6] Peter Hogg employs several arguments to deny the Court's partiality, among them that the professionalism of the judges would be compromised by such partiality.[7]

It is by no means easy to make a judgment about the bias or lack of it of the Supreme Court in constitutional cases. Perhaps the issue is badly framed. While an analogy is sometimes made between the role of the Supreme Court and that of an umpire in athletic contests, there are differences. An umpire is the interpreter of clear and well-understood rules which he or she had no part in framing. Constitutional adjudication is a hugely more complicated process. In arguing that the judiciary has no useful role to play in delineating the division of powers between Ottawa and the provinces and that this process should take place almost wholly through intergovernmental negotiation, Paul Weiler writes:

> Current judicial review in the Supreme Court of Canada means that the court is holding legislation valid or invalid on the basis of standards which it is making up as it goes along.[8]

Weiler's more general analysis asserts that questions involving the federal-provincial division of powers are essentially political and unsusceptible to resolution by resort to "stable legal principles."

It appears inevitable that the Supreme Court will increasingly become a focus of Canadian political controversy. There is no reason to foresee any lessening in the impulses of the federal and provincial governments to resort to the courts in protecting or extending their respective jurisdictions. Even more crucially, in its interpretations of the Charter of Rights and Freedoms, the Court will almost inevitably come into conflict with powerful governmental and private centres of power in Canadian society. The coming into effect of the Charter is likely to increase polarization among Canadians around the axes of certain key values of freedom, equality and so on. As this chapter is written (May 1984), the Court has decided only two cases involving the Charter. However, if the Court should in future uphold decisions of certain provincial courts related to, for example, restrictions in the powers of police, the rights of prostitutes to pursue their livelihood and the unconstitutionality of provincial censorship of films, it is overwhelmingly likely that it will arouse powerful public reactions. On the other hand, if the Supreme

Court pursues a generally conservative course, those persons and groups who were led to believe that the Charter could and would "guarantee" rights in an absolute way will be enraged.

When the Court becomes a focus of political controversy, on what reservoirs of legitimacy will it draw? Peter Russell pointed out some years ago that Canadians had a naïve and unsophisticated view of the judicial function based on the notion that courts were no more than interpreters of the law and thus did not in any real sense of the word exercise power.[9] Canadians are now in the process of an abrupt awakening to the fact that the judiciary does have power. If the Supreme Court of Canada is to have a degree of success in converting power into authority, changes are urgently needed in the position of that body in the Canadian system of government.

Entrenchment[10]

There seems to be no dissent from the general proposition that there should be a constitutional entrenchment of provisions related to the powers and jurisdiction of the Supreme Court of Canada, its composition and the procedure by which its members are chosen. Under section 101 of the Constitution Act, 1867 (formerly known as the British North America Act, 1867), the Parliament of Canada has the power to provide for the "constitution, maintenance and organization" of the Court, and there are no constitutional restrictions on the power of the Governor-in-Council to appoint members of the Court. In a regime in which the Constitution is "the supreme law of Canada," it is patently anomalous that the federal authorities alone have the power to alter the jurisdiction and composition of the Court which is the final and authoritative interpreter of the Constitution, to appoint whom they wish to the Court or even to abolish it entirely.

The Constitution Act, 1982 appears to envisage the future constitutional entrenchment of provisions related to the Supreme Court. Section 41(d) specifies that amendments to the Constitution related to the "composition of the Supreme Court of Canada" can be made only with the agreement of Parliament and the legislatures of all the provinces. Section 42(d) provides that "subject to 41(d)" amendments related to the Court are subject to the amending procedure, which requires the consent of Parliament and two-thirds of the provinces having in aggregate half the population in Canada. These provisions are somewhat strange in that the changes to which they refer can now be made by the exercise of the ordinary law-making powers of Parliament alone without amendment of the Constitution. What seems to be anticipated are future constitutional provisions relating to the Court which could be changed only by resort to one of these two amending procedures.[11]

Jurisdiction

We recommend that the Supreme Court of Canada should remain the final appellate court in all areas of Canadian law, with its jurisdiction entrenched in the Constitution. Two other reforms incorporated in the "best efforts" draft reached by the Continuing Committee of Ministers on the Consitution to First Ministers, presented in 1980, should also be incorporated in the Constitution. The draft recommends that the provincial as well as the federal governments should be able to refer questions on reference directly to the Supreme Court. This would strengthen the Court, in the symbolic sense at least, as an institution which is not merely an instrument of the federal authorities. The draft also urges that the Court's power to grant leave to appeal in cases involving constitutional issues should be entrenched. Other rights to appeal should continue to be determined by Parliament, the draft proposes.

Previous recommendations have called for barring the Supreme Court's jurisdiction from questions of purely provincial law. Some in Quebec have questioned the legitimacy of the Court with its English common law majority in having the final say in cases involving Quebec civil law. A less radical proposal would provide in the constitution that civil law cases be heard by a panel or chamber of civilian judges.

Apart from references brought before it by the federal government and a small number of very serious criminal cases where there is appeal by right, the Supreme Court is now in control of the cases it will hear. Except in a very few situations, the Court is unlikely to grant leave to appeal where the law of a single province only is at issue. The very large number of cases arising and which will arise under the Charter of Rights and Freedoms is likely to accelerate this trend. Thus, in purely operational terms, relatively little would be gained by a constitutional restriction of the Court's power to hear appeals involving only provincial law. Interestingly, the Beige Paper issued by the Quebec Liberal party in 1980 recommends that the jurisdiction of the Supreme Court to hear civil law appeals continue on the general grounds that this situation gives residents of Quebec the same "appellate resources" as those of persons living in other provinces. The Beige Paper also suggests that Quebec law has been very much influenced by English law and that it is often difficult to disentangle civil law from other issues in particular cases.

There have also been recommendations from time to time that constitutional cases be heard by a court with constitutional jurisdiction only or by panels established to hear such cases. Such proposals may have been more relevant in the period prior to the mid-1970s when most of the Court's work involved appeals by right in private law cases. Beyond the general objection that is sometimes difficult to distinguish constitutional cases from those which are not, the Supreme Court of Canada is evolving rapidly to a position where most of its activity is in constitutional

matters. The coming into effect of the Charter of Rights and Freedoms will no doubt accelerate this trend.

Size and Regional Composition

Because of Quebec's civil law system, the constitution should guarantee that province membership in the Supreme Court. In recent years there have been several proposals that the constitution should increase the number of judges to 11 and that there should be constitutional provision for regional and provincial representation beyond Quebec. The federal government's Bill C-60 of 1978 provided for an 11-judge Court with four of its members from Quebec and a requirement that the other seven should be appointed:

> to ensure at all times, as near as reasonably may be, membership in the Court of a judge or judges appointed from among the Atlantic provinces, from Ontario, from among the Western provinces exclusive of British Columbia, and from British Columbia. [12]

The British Columbia government's proposals of 1978 recommended an 11-member Court with no provision for Quebec's special status but suggested that at least one judge should come from each of Canada's five regions. The Pepin-Robarts task force also recommended an 11-judge Court with five from Quebec and a regional distribution among the other six. It could be argued that a larger Court would not only improve its representativeness but also that by sitting in panels the larger Court would be able to reduce the backlog of cases.

Should the principle of regional representation in the Court be guaranteed by constitutional provision, apart from Quebec's special claims? A plausible argument can be made that the work of the Court does not and should not involve any distinctive Western, Ontario or Atlantic viewpoints. Further, to entrench regional membership suggests that judges represent the regions from which they are drawn, something quite foreign to judicial independence and other accepted norms governing the judicial role. However, W.R. Lederman argues for the appropriateness of regional quotas on grounds we find persuasive. Canada is a diverse country, and members of the Court should be in a position

> to inform and educate one another on essential facts and background from their respective parts of Canada. This is the vital factor of relevant judicially-noticed knowledge that . . . was missing in the judges of the Judicial Committee of the Privy Council. [13]

Beyond the considerations that Lederman mentions, there is of course the symbolic value of entrenching the regional composition of the Court, something of considerable significance as it assumes an increasingly visible and contentious role in the Canadian system of government.

Although we propose that the constitution provide for the regional composition of the Supreme Court, this need not mean that the size of the Court should be increased. There is now some criticism that decisions of individual judges reflect too little interaction among them, with the result that the law as enunciated in such decisions is less clear than it should be. Collegiality would be further weakened if the size of the Court were increased. Further, a larger Court would probably mean a higher proportion of important cases would be decided by less than a full Court, with the inevitable suspicion that the selection of judges influenced the outcome. On balance, therefore, we propose that the size of the Court remain at nine, with three of these coming from Quebec and at least one from each of the other regions — namely, the Atlantic provinces, Ontario, the Prairie provinces and British Columbia.

Appointment of Members

There are no constitutional restrictions on the power of the Governor-in-Council in appointing members of the Court. In practical terms, appointments are a prerogative of the prime minister. But certain trends have emerged.

Apart from the statutory requirement providing for Quebec membership in the Court, there has been some recognition of cultural duality and regionalism. Until 1944 only one of the chief justices was a francophone, but from that time onward three francophone chief justices have succeeded English-speaking Canadians. This rotation was broken only in 1984 when Chief Justice Brian Dickson was appointed after the death of Chief Justice Bora Laskin. Since 1949, the Court has had three members from Ontario, two from the West and one from the Atlantic region, except during the 1979–82 period, when Ontario had two and the western provinces had three.

Contrary to the practice in the earlier years of Confederation, few persons who have been active political partisans have been appointed to the Court. Since the end of the Second World War, only Mr. Justice Abbott, appointed in 1954, and Mr. Justice Chouinard, appointed in 1979, had previously contested elective office. Even here, the latter's career as a Progressive Conservative partisan appears to have been a short one.

The federal authorities appear not to have given much weight to the person's political philosophy or jurisprudence in making appointments to the Court. Peter Hogg points out that, of the three justices appointed to the Court who had written about the constitution before their appointment — Bora Laskin, Louis-Philippe Pigeon and Jean Beetz — the latter two had been sympathetic to the protection of provincial rights.

The background of Supreme Court justices is changing. As one observer writes:

In relation to the Supreme Court of Canada, one might note the recent tendency to appoint persons with little — if any — "street" litigation experience, but rather with backgrounds in relatively secure, authoritative positions in academe, lofty corporate practice, or the bureaucracy.[15]

Until the present decade, there was little public interest in the Supreme Court of Canada apart from those in the legal community, on the bench or in restricted circles in government. Consequently, in appointing persons to that body, federal authorities have acted outside the scope of public scrutiny and concern. With the increasing significance of the Court's role in constitutional adjudication, particularly with respect to the Charter, this situation is not likely to continue. The heightened public concern will probably manifest itself in terms of the representativeness of the Court in terms of regionalism, gender and perhaps other dimensions, such as the political philosophy and jurisprudence of appointees. Such concern may well decrease the present emphasis on regional representatives and emphasize other factors such as gender and political outlook.

Canada is one of the few federal nations in which the federal executive does not share the power to appoint members to the final appellate court. Appointments to the Supreme Court of the United States must be ratified by the Senate. An amendment to the High Court of Australia Act, 1979 provides that

> where there is a vacancy in an office of Justice, the Attorney-General shall, before an appointment is made to the vacant office, consult with the Attorneys-General of the States in relation to the appointment.[16]

In the Federal Republic of Germany, half the members of the Constitutional Court are elected by the Bundestag and half by the Bundesrat. The Constitution of India provides that, in the appointment of a judge other than the Chief Justice to the Supreme Court, the Chief Justice of India must always be consulted and, in appointments to the Court, the president may consult with "such of the Judges of the Supreme Court and of the High Courts of the States as the President may deem necessary."[17]

Two ways of sharing authority to make appointments to the Supreme Court of Canada have been proposed. One would require ratification of such appointments by a Bundesrat-type of Federal Council or Council of the Provinces. The other would involve the provincial governments directly in the appointing process.

We argue in Chapter 7 in favour of an elected Senate rather than a Bundesrat-type second chamber in Canada. Interestingly, proposals for an elected Senate have usually not given that institution any involvement in appointments to the Supreme Court.

In the constitutional review process of the last decade and a half, there has been considerable discussion of provisions to share authority to appoint Supreme Court justices. The Victoria Charter of 1971 provided

for the appointment of such persons (other than the chief justice if that person was already a member of the Court) after consultation between the Attorney General of Canada and the Attorney General of the "appropriate province." This provision embodied an extraordinarily complex scheme for referring such choices to two alternative types of "nominating council" if the representatives of the two governments could not agree. The "best efforts" draft of the committee of ministers in 1980 contained a much simpler provision for resolving such deadlocks:

> Where consent is not forthcoming, the Minister of Justice of Canada and the appropriate provincial Attorney-General shall, together with (a person chosen by them or if they do not agree a person chosen by) the Chief Justice of Canada, determine the person to be recommended for appointment.[18]

We recommend the latter proceedings. While Hogg is no doubt accurate in suggesting that the federal authorities in the past have not given much weight to the constitutional philosophies of prospective appointees to the Court, it is reasonable to suppose that such factors will become more important as stakes in constitutional adjudication increase, as in the United States. Thus, the involvement of the provincial governments in the appointment process is appropriate and even urgent if the legitimacy of the Court is to be sustained. Yet we would go further and argue the appropriateness of a constitutional change providing in addition for the ratification of appointments to the Court, made either through agreements between governments or, in the case of disagreement, by a committee of the Senate whether appointed or elected. We also recommend that the proceedings of such committees involved in ratification be public. With the increasingly important and visible nature of the Court, the constitutional philosophies of its prospective members should be subjected to public scrutiny.

In general, institutional reforms are necessary to further strengthen the legitimacy of the Supreme Court of Canada as it becomes a more visible and contentious institution. At a minimum, the powers and jurisdiction of the Court require constitutional entrenchment. We also suggest constitutional amendments providing that appointees to the Court be drawn from Canada's regions and that such appointees be ratified by a process involving both the provincial governments and an elected Senate.

Conclusions

Our critical review of recent proposals for interstate reform within Canada's federal institutions has led us to conclude that many of its proponents have overstated the beneficial effects of such reform or have underestimated the countervailing impact of other political factors. Nonetheless, there is a case for enhancing the responsiveness of the federal institutions to regional values and interests.

The sweeping Progressive Conservative election victory of September 1984 has ensured for the time being a government in Ottawa which strongly represents all regions, but the opposition parties continue to be regionally skewed in their representation. Furthermore, the structural factors which produced regional imbalances and insensitivities within the national parties and federal governments during the past decade and a half remain. These require attention if their recurrence in the future is to be deterred.

In considering reforms to enhance the intrastate elements of Canadian federalism, the critical factor is the impact that parliamentary responsible government, with its attendant domination by the executive, will have on federalism. Effective intrastate federalism will ultimately depend on the degree to which the cabinet is able to embody and express intrastate federalism in its composition, its decision-making processes and its political and administrative roles. For this reason, the cabinet is the focus of our policy recommendations relating not only to the executive but also to the electoral system, the House of Commons and the Senate.

The balance within the executive between the technocratic and political impulses has recently been shifting back in favour of the latter. With this swing, there has been a trend toward a greater sensitivity to regional

concerns. To provide the bureaucratic bases for supporting this trend, we recommend in Chapter 5 retaining the offices of federal economic development coordinators, as introduced in the 1982 reform of the economic and regional development portfolio (MSERD). Additionally, procedures should be established to ensure that prospective senior public servants get experience in the field outside the national capital region.

The House of Commons provides the representational base for the federal government. Therefore, Chapter 6 proposes for consideration a new electoral system using either of two voting procedures, depending on the constituency. MPS from the larger urban areas would be elected by proportional representation using the single transferable vote. MPS elsewhere would be elected from single-member constitutencies using the alternative vote procedure. In our view, this would further the aims of intrastate federalism by emphasizing in Ottawa the regional distribution of electoral support, and by giving more coherent expression to the views and interests of urban centres as distinct geographical communities. These proposals have some potential for moderating inter-regional and French-English political conflict, as well.

As for Senate reform, we conclude in Chapter 7 that a persuasive case can be made for a popularly elected Senate, but only if it has sufficient powers to influence or even check governments backed by House of Commons' majorities. We also draw attention to the possibility of interim reforms that might improve the Senate's effectiveness until such time as agreement can be reached upon a constitutional amendment for an elected Senate.

With the increasing significance of the Supreme Court's role in constitutional adjudication, particularly as a result of the Charter of Rights and Freedoms, we can expect increasing public concern about the representativeness of the Court in regional and other terms. While the Court's past record for impartiality and independence is good, Canada is rare among federations in leaving the appointment of its ultimate appellate court totally in the hands of the central government. To ensure the perception of the Court's regional sensitivity and independence, we suggest in Chapter 8 a constitutional provision to explicitly ensure a regional distribution of membership. We would also provide for appointments to the Court to involve the consultative process set forth in the "best efforts" draft of the Continuing Committee of Ministers on the Constitution, produced in 1980. This consultative process should be followed by ratification by the elected Senate.

At the current time, economic rather than constitutional issues are at the top of Canada's political agenda. In the long term, however, constitutional arrangements shape the processes by which political decisions are made. In considerable measure, these determine the capacity of the federal government to mobilize resources and to develop economic,

social and foreign policies having a wide degree of support within the federation. To the extent that the reform of federal institutions enables the elements of intrastate federalism to reconcile and accommodate more effectively the variety of regional values and interests, such reform will contribute to the economic union and development prospects for Canada.

Notes

INTRODUCTION

1. The sovereignty/association alternative as presented by the Parti Québécois in its white paper of 1979 was in fact a confederation as this term was used in the past but, significantly, was not presented as such, but rather as a common market arrangement.

2. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 7th ed. (London: Macmillan, 1980), p. 140.

3. K.C. Wheare, *Federal Government*, 4th ed. (London: Oxford University Press, 1963), p. 10.

4. See Morton Grodzins, *The American System*, edited by Daniel Elazar (Chicago: Rand McNally, 1966), particularly chap. 2.

5. Christopher Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government 1867–1942* (Toronto: University of Toronto Press, 1981); H.V. Nelles, *The Politics of Development: Forests, Mines and Hydro-Electric Power in Ontario, 1849–1941* (Toronto: Macmillan, 1974).

6. There are, however, some interesting essays on federal-provincial relations in the years immediately after 1867 in Bruce W. Hodgins, Don Wright, and W.H. Heick, eds., *Federalism in Canada and Australia: The Early Years* (Waterloo: Wilfrid Laurier University Press, 1978).

7. Parris N. Glendenning, and Mavis Mann Reeves, *Pragmatic Federalism: An Inter-governmental View of American Government* (Pacific Palisades: Palisades, 1984).

8. Preston King, *Federalism and Federation* (Baltimore: Johns Hopkins University Press, 1982), p. 77.

9. For a detailed and authoritative account of the founding of the Australian Common-wealth, see J.W. Lanauze, *The Making of the Australian Constitution* (Melbourne: Melbourne University Press, 1972).

10. R.L. Watts, "Second Chambers in Federal Political Systems," in Ontario Advisory Committee on Confederation, *Background Papers and Reports: The Confederation Challenge*, vol. 2 (Toronto: Queen's Printer, 1970), p. 331.

11. Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," in *The Politics of American Federalism*, edited by Daniel Elazar (Lexington: Heath, 1969), pp. 31–38.

12. However, in 1975, the Supreme Court of the United States decided that the rules of national party conventions relating to the selection of delegates to such conventions took precedence over state laws relating to delegate selection. *Cousins v. Wigoda*, 419 U.S. 477 (1975).

13. The terms "interstate federalism" and "intrastate federalism" come from Karl Loewenstein, *Political Power and the Governmental Process* (Chicago: University of Chicago Press, 1965), p. 405. However, the way in which these terms are used in our study and in recent Canadian political debate diverges somewhat from Loewenstein's formulation.

CHAPTER 1

1. F.A. Kunz, *The Modern Senate of Canada 1925–1963: A Re-Appraisal* (Toronto: University of Toronto Press, 1965), chap. 13. Kunz writes: "Senate reform . . . has long since ceased to be the subject of serious consideration in political science" (p. 367), and he quotes a statement of Henri Bourassa made in 1927 that Senate reform "comes periodically like other forms of epidemics and current fevers" (p. 367).

2. P.B. Waite, *Arduous Destiny: Canada 1874–1896* (Toronto: McClelland and Stewart, 1971), pp. 194–95.

3. F.R. Scott el al., *Social Planning for Canada* (Toronto: University of Toronto Press, 1975), chap. 21.

4. Ibid., p. 503.

5. Ibid., p. 501.

6. Canada, Senate, 18th Parliament, 4th Session, *Report Pursuant to Resolution of the Senate to the Honourable Speaker by Parliamentary Council Relating to the Enactment of the British North America Act, 1867, and any Lack of Congruence between its Terms and Judicial Construction of Them and Cognate Matters* (Ottawa: King's Printer, 1940), p. 13.

7. Edward McWhinney, *Quebec and the Constitution 1960–1978* (Toronto: University of Toronto Press, 1979).

8. Quebec, Royal Commission of Inquiry on Constitution Problems, *Report* (Quebec: Queen's Printer, 1956).

9. McWhinney, *Quebec and the Constitution*, chaps. 3 and 4.

10. Don Murray and Vera Murray, *De Bourassa à Lévesque* (Montreal: Les Éditions Quinze, 1978), pp. 25–46.

11. Daniel Johnson, *Égalité ou indépendance* (Montreal: Éditions Renaissance, 1965).

12. Rt. Hon. Lester B. Pearson, *Federalism for the Future* (Ottawa: Queen's Printer, 1969).

13. Ibid., pp. 6–10.

14. Thomas J. Courchene, *The Political Economy of Canadian Constitution-Making: The Canadian Economic Union Issue* (London: University of Western Ontario, Centre for the Economic Analysis of Property Rights, 1983).

15. Canada, Royal Commission on the Status of Women, *Report* (Ottawa: Information Canada, 1970).

16. For accounts of those developments, see Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women's Press, 1983); Chaviva Hosek, "Women and the Constitutional Process," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by Keith Banting and Richard Simeon (Toronto: Methuen, 1983), pp. 280–300.

17. Canadian Intergovernmental Conference Secretariat, *Secretary's Report: The Constitutional Review, 1968–1971* (Ottawa: Information Canada, 1974), p. 461.

18. Federal-Provincial Conference, *Proceedings*, Ottawa, November 26–29, 1963 (Ottawa: Queen's Printer, 1964), pp. 44–46.

19. Canada, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Final Report* (Ottawa: Information Canada, 1972).

20. Roger Gibbins, "Constitutional Politics and the West," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by Keith Banting and Richard Simeon (Toronto: Methuen, 1983), pp. 120–22.

21. Ibid., p. 120.

22. Ibid., p. 121.

23. Ibid., p. 122.

24. Roger Gibbins, *Prairie Politics and Society: Regionalism in Decline* (Toronto: Butterworth, 1980), p. 167.

25. Gordon Robertson, "The Role of Interministerial Conferences in the Decision-Making Process," in *Confrontation and Collaboration: Intergovernmental Relations in Canada Today*, edited by Richard Simeon (Toronto: Institute of Public Administration of Canada, 1979), pp. 81–86.

26. *Reference re Legislative Authority of Parliament to Alter or Replace the Senate* (1980), 1 S.C.R. 54.

27. Thomas J. Courchene, "Analytical Perspectives on the Canadian Economic Union," in *Federalism and the Canadian Economic Union*, edited by M.J. Trebilcock et al. (Toronto: University of Toronto Press for Ontario Economic Council, 1983), pp. 86–87: "Ottawa appears to envisage the whole approach to securing an internal common market as a means by which its role on the regional side can be increased."

28. Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal, 1980). There was another stream of major analyses of the constitutional system represented, for example, by the Parti Québécois white paper, *Quebec-Canada: A New Deal* (Quebec, 1979), which approached the subject in terms of alternatives to federalism.

29. Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (Ottawa, 1978).

30. Canada, Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Minister of Supply and Services Canada, 1979).

31. David Elton, F.C. Englemann, and Peter McCormick, *Alternatives: Towards the Development of an Effective Federal System for Canada* (Calgary: Canada West Foundation, 1978).

32. Ontario Advisory Committee on Confederation, *First Report* and *Second Report* (Toronto, 1978 and 1979).

33. British Columbia, *Constitutional Proposals* (Victoria, 1978).

34. Gordon Gibson, Ernest Manning, and Peter McCormick, *Regional Representation: The Canadian Partnership* (Calgary: Canada West Foundation, 1981).

35. Roger Gibbins, *Regionalism: Territorial Politics in Canada and the United States* (Toronto: Butterworth, 1982).

36. The Quebec government's white paper on sovereignty/association published in 1979 was in a sense a Quebec contribution to the constitutional debate but only in a somewhat tangential way because its proposals went outside the bounds of Quebec and Canada living within one constitutional order.

37. Task Force on Canadian Unity, *A Future Together*, p. 21.

CHAPTER 2

1. Alan C. Cairns, *From Interstate to Intrastate Federalism* (Kingston: Queen's University, Institute of Intergovernmental Relations, 1979), pp. 11–13.

2. Alberta, *A Provincially Appointed Senate: A New Federalism for Canada* (Edmonton, 1982), p. 27.

3. Peter McCormick, Ernest Manning and Gordon Gibson, *Regional Representation: The Canadian Partnership* (Calgary: Canada West Foundation, 1981).

4. Roger Gibbins, *Regionalism: Territorial Politics in Canada and the United States* (Toronto: Butterworth, 1982).

5. David Elton, F.C. Engelmann and Peter McCormick, *Alternatives: Towards the Development of an Effective Federal System for Canada*, Amended Report (Calgary: Canada West Foundation, 1981), pp. 4–5.

6. McCormick, Manning and Gibson, *Regional Representation*, pp. 36–37.

7. W.P. Irvine, *Does Canada Need a New Electoral System?* (Kingston: Queen's University, Institute of Intergovernmental Relations, 1979), p. x.

8. Ibid., p. 77.

9. Donald Smiley, "Territorialism and Canadian Political Institutions," *Canadian Public Policy* 3 (Autumn 1977): 456.

10. Ontario Advisory Committee on Confederation, *First Report* (Toronto, 1978), p. 2.

11. Ibid., p. 3.

12. McCormick, Manning and Gibson, *Regional Representation*, p. 6.

13. Gordon Robertson, "The Role of Interministerial Conferences in the Decision-Making Process," in *Confrontation and Collaboration: Intergovernmental Relations in Canada Today*, edited by Richard Simeon (Toronto: Institute of Public Administration of Canada, 1979), p. 82.

14. McCormick, Manning and Gibson, *Regional Representation*, p. 6.

15. See particularly these influential writings: Stein Rokkan, "Electoral Mobilization, Party Competition and National Integration," in *Political Parties and Political Devel-*

opment, edited by Joseph W. Palombara and Myron Weiner (Princeton: Princeton University Press, 1966), pp. 241–66; and Samuel Beer, "The Modernization of American Federalism," in *Publius* 3 (Fall): 49–96.

16. Gibbins, *Regionalism*, p. 190.

17. Ibid., p. 191.

18. Ibid., p. 196.

19. Ibid., p. 196.

CHAPTER 3

1. There was some disposition in the 1970s to designate Canada as corporatist. See, particularly, K.J. Rea and J.L. McLeod, eds., *Business and Government in Canada*, 2d ed. (Toronto: Methuen, 1976), pp. 334–35. But see also the devastating critique by Leo Panitch, "Corporatism in Canada?" in *The Canadian Political Process*, 3d ed., edited by Richard Schultz, Orest M. Kruhlak, and John C. Terry (Toronto: Holt, Rinehart and Winston, 1979), pp. 53–72.

2. Donald Smiley, *Canada in Question: Federalism in the Eighties*, 3d ed. (Toronto: McGraw-Hill Ryerson, 1980), chap. 5.

3. Richard Simeon, *Federal-Provincial Diplomacy* (Toronto: University of Toronto Press, 1982), p. 282.

4. William Irvine, *Does Canada Need a New Electoral System?* (Kingston: Queen's University, Institute of Intergovernmental Relations, 1979), p. 77.

5. Richard Simeon, "Constitutional Development and Reform," in *Canadian Politics in the 1980s*, edited by Michael S. Whittington and Glen Williams (Toronto: Methuen, 1981), p. 250.

6. Alan C. Cairns, *From Interstate to Intrastate Federalism* (Kingston: Queen's University, Institute of Intergovernmental Relations, 1979), pp. 22–23.

7. An Australian political scientist who has a sophisticated knowledge of Canada asserted in a conversation with one of the authors that, if the Whitlam government in power in Canberra from 1971 to 1975, which had a deep-seated hostility towards federalism, had had the constitutional powers of a federal government in Canada, then Australian federalism would have been in any genuine sense destroyed.

8. Cairns, *From Interstate to Intrastate Federalism*, p. 19.

9. Robert Nisbet, *Twilight of Authority* (New York: Oxford University Press, 1979), p. 6.

10. Simeon, *Federal-Provincial Diplomacy*, pp. 280–81.

11. Edward A. Carmichael and James K. Stewart, *Lessons From the National Energy Program* (Toronto: C.D. Howe Institute, 1983), pp. 44–47.

12. Reginald Whitaker, *The Government Party: Organizing and Financing the Liberal Party of Canada, 1930–1958* (Toronto: University of Toronto Press, 1977), pp.413–14.

13. A.H. Birch, *Representative and Responsible Government* (Toronto: University of Toronto Press, 1964), p. 243.

CHAPTER 4

1. Taylor Cole, "New Dimensions of West German Federalism," in *Comparative Politics and Political Theory*, edited by Edward L. Pinney (Chapel Hill, N.C.: University of North Carolina Press, 1966), p. 102.

2. For details, see R.L. Watts, *New Federations: Experiments in the Commonwealth* (Oxford: Clarendon Press, 1966), pp. 248–81.

3. Canada, Royal Commission on the Economic Union and Development Prospects for Canada, *Challenges and Choices* (Ottawa: Minister of Supply and Services Canada, 1984), p. 64.

4. Ibid., p. 26.

5. Ivo D. Duchacek, *Comparative Federalism: The Territorial Dimension of Politics* (New York: Holt, Rinehart and Winston, 1970), pp. 244–55, 274–75.

6. K.C. Wheare, *Federal Government*, 4th ed. (London: Oxford University Press, 1963), p. 53.

7. R.A. Dahl, *Pluralist Democracy in the United States: Conflict and Consent* (Chicago: Rand McNally, 1967), p. 24.

8. Morton Grodzins, "The Federal System," in *American Federalism in Perspective*, edited by A. Wildavsky (Boston: Little, Brown, 1967), p. 257.

9. Ibid., pp. 257–58.

10. *The Federal Constitution of the Swiss Confederation*, 1848, arts. 20, 40 and 64 (as amended 1898).

11. R.L. Watts, *Administration in Federal Systems* (London: Hutchinson Educational, 1970), pp. 70–72.

12. R.L. Watts, "Second Chambers in Federal Political Systems," in Ontario Advisory Committee on Confederation, *Background Papers and Reports: The Confederation Challenge*, vol.2 (Toronto: Queen's Printer, 1970), p. 350.

13. R.L. Matthew, *Issues in Australian Federalism: Tenth R.C. Mills Memorial Lecture, Sydney, 18 October 1977* (Canberra: Centre for Research on Federal Financial Relations, 1977), p. 13.

14. Alan Cumming, Thom Lynch, and Anne Lynch, eds., *Fixed Term Parliaments*, Proceedings of the Third Annual Meeting of the Australasian Study of Parliament Group (Tasmania, 1982).

15. J.B.D. Miller, *Australian Government and Politics*, 3d ed. (London: Gerald Duckworth, 1964), p. 114.

16. Watts, *New Federations*, pp. 274–78; R.L. Watts, *Multicultural Societies and Federalism*, study prepared for the Royal Commission on Bilingualism and Biculturalism (Ottawa: Information Canada, 1970), pp. 65–66.

17. Campbell Sharman, "Calhoun: The Missing Element in Australian Federalism" (Vancouver: University of British Columbia, November 1982), pp. 16–17. Mimeographed.

18. Kenneth D. McRae, *Switzerland: Example of Cultural Coexistence* (Toronto: Canadian Institute of International Affairs, 1964), p. 26; C. Hughes, *The Parliament of Switzerland* (London: Oxford University Press, 1962), pp. 74–80.

19. Watts, *Multicultural Societies and Federalism*, pp. 66–67.

20. Watts, *Administration in Federal Systems*, pp. 33–43.

21. Ibid., pp. 42–43.

22. G.A. Codding, *The Federal Government of Switzerland* (London: George Allen and Unwin, 1961), pp. 76–78, 116–20.

23. Elmer Plischke, *Contemporary Government of Germany* (Boston: Houghton Mifflin, 1961), pp. 70, 161–63.

24. Ibid., p. 163.

25. See, for example, Miller, *Australian Government and Politics*, pp. 108–11.

26. Direct election for senators was introduced subsequently by the 17th Amendment, 1913.

27. For details, see Watts, "Second Chambers in Federal Political Systems," pp. 315–55.

28. For examples, see the Hon. Mark MacGuigan, "Reform of the Senate," discussion paper presented to the Special Joint Committee of the Senate and House of Commons on Senate Reform, June 16, 1983, Ottawa, pp. 1–3; Canada, Special Joint Committee of the Senate and House of Commons on Senate Reform, *Report* (Ottawa: Minister of Supply and Services Canada, 1984), pp. 7–10; and Royal Commission on the Economic Union, *Challenges and Choices*, pp. 24, 67–68.

29. For details, see Watts, "Second Chambers in Federal Political Systems," pp. 334–36.

30. In Australia, however, such a joint sitting only follows a double dissolution; the ability to force double dissolution therefore considerably strengthens the position of the Senate.

31. For details, see Watts, "Second Chambers in Federal Political Systems," pp. 338–39.

32. See particularly three articles by Campbell Sharman, "The Australian Senate as a States House," *Politics* 12 (2): 64–75; "Calhoun: The Missing Element in Australian Federalism," pp. 19–22; and "Partisanship and Electoral Engineering: Proportional Representation and the Australian Senate," paper presented to the Annual Convention of the Western Political Science Association, Seattle, March 24–26, 1983, pp. 19–21.

33. Watts, "Second Chambers in Federal Political Systems," pp. 348–49.

34. Canadian proponents have included the Government of British Columbia (1978), the Ontario Advisory Committee on Confederation (1978), the Progressive Conservative Party of Canada (1978), The Canada West Foundation (1978), The Canadian Bar Association (1978), the Task Force on Canadian Unity (Pepin-Roberts) (1979), the Quebec Liberal Party (1980) and the Government of Alberta (1982).

35. See, for instance, Canada, Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Minister of Supply and Services Canada, 1979), pp. 94–99.

36. Cole, "New Dimensions of West German Federalism," pp. 102–6, 119–20.

37. See the discussion of this dynamic as it might apply to Canada in Task Force on Canadian Unity, *A Future Together*, p. 98.

38. See MacGuigan, "Reform of the Senate," pp. 35–36; Special Joint Committee on Senate Reform, *Report*, pp. 23–33; Rt. Hon. P.E. Trudeau, letter to the Hon. Paul Cosgrove, April 10, 1984.

39. Sharman, "Partisanship and Electoral Engineering," p. 8.

40. Ibid., p. 20–21.

41. Watts, "Second Chambers in Federal Political Systems," pp. 342–43.

42. MacGuigan, "Reform of the Senate," Table 1, p. 29; Special Joint Committee on Senate Reform, *Report*, p. 29.

43. Codding, *Federal Government of Switzerland*, pp. 101–12.

44. *The Federal Constitution of the Swiss Confederation*, art. 89.

45. Codding, *Federal Government of Switzerland*, p. 65.

46. For details, see Watts, *New Federations*, pp. 286–88.

CHAPTER 5

1. T.A. Hockin, *Government in Canada* (Toronto: McGraw-Hill Ryerson, 1976), p. 7. In tracing the evolution of the British Columbia Constitution Act from its origins in 1871 until the present, Campbell Sharman, "The Strange Case of a Provincial Constitution: The British Columbia Constitution Act," *Canadian Journal of Political Science* 17 (March 1984) p. 105, writes: "It is only a slight exaggeration to say that the present Constitution Act is little more than an enabling act for executive dominance of the governmental process."

2. We are indebted on this general point to conversations with George Szablowski.

3. There is a considerable literature on these changes. One of the best analyses is by Richard D. French, ed., *How Ottawa Decides: Planning and Industrial Policy-Making 1968–1984*, 2d ed. (Toronto: James Lorimer, 1984).

4. W.L. Morton, "The Cabinet of 1867," in *Cabinet Formation and Bicultural Relations: Seven Case Studies*, edited by F.W. Gibson, study prepared for the Royal Commission on Bilingualism and Biculturalism (Ottawa: Information Canada, 1970), p. 6.

5. Robert MacGregor Dawson, *The Government of Canada*, 4th ed. (Toronto: University of Toronto Press, 1963), p. 194.

6. Richard Van Loon and Michael S. Whittington, *The Canadian Political System*, 2d ed. (Toronto: McGraw-Hill Ryerson, 1976), p. 317.

7. F.W. Gibson, ed., *Cabinet Formation and Bicultural Relations*, study prepared for the Royal Commission on Bilingualism and Biculturalism (Ottawa: Information Canada, 1970), p. 165.

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10. Paul G. Thomas, "The Role of National Party Caucuses," in *Party Government and Regional Representation in Canada*, volume 36 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985). This study also contains a valuable discussion of the regional caucuses, of which the Quebec Liberals is the most cohesive and influential.

11. The Liberal caucuses expelled Toronto MP Ralph Cowan in 1968 for his persistent challenges to the party and its leader. In the 1974 general election, the Progressive Conservative leader took the highly unusual step of refusing to accept the candidature of Leonard Jones of Moncton who had received the nomination of the local party and was elected at this election as an Independent. The law now requires that party leaders endorse official candidates but this formal power is in large part illusory. For the most comprehensive account available of the federal nominating process, see Robert J. Williams, "Candidate Selections," in *Canada at the Polls, 1979 and 1980*, edited by Howard R. Penniman (Washington, D.C.: American Enterprise Institute, 1981), pp. 86–120.

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